Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

DAVIS, RENO & COURTNEY,

*Cross-Petitioner,*

v.

CITY OF WESTMINSTER, CALIFORNIA; CHARLES V. SMITH; CRAIG SCHWEISINGER; TONY LAM; DON S. ANDERSON; JOHN T. DEMONACO; BRIAN MAYHEW; ROBERT HUNTLEY; CHARMAYNE BOHMAN; RICHARD JONES; DON HERR; JOE WILSON; and MICHAEL GARRISON,

*Cross-Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## CROSS-PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this Court should clarify, modify, or limit its holdings in *Evans v. Jeff D.*, 475 U.S. 717 (1986) and *Venegas v. Mitchell*, 495 U.S. 82 (1990) to the extent the Court appears to have held therein that fee awards under 42 U.S.C. § 1988 must always be granted to the prevailing parties rather than to their attorneys?

2. Whether a federal District Court may, in the exercise of its general equitable powers, grant attorney's fees awarded under 42 U.S.C. § 1988 directly to the prevailing party's attorney and/or to persons or organizations that actually paid the costs of the litigation?

3. Whether this Court should reverse the Ninth Circuit's holding in this case that attorney's fees awarded under 42 U.S.C. § 1988 must be granted to the prevailing plaintiffs rather than their attorneys because there was no fee agreement assigning the award to counsel?

4. Whether, as a matter of sound judicial administration, this Court should establish the rule that disputes between attorneys and their clients over statutory fee awards should be resolved by the trial judge who heard the case rather than in collateral litigation in a different court?

## LIST OF PARTIES

The parties to the proceeding below were the cross-petitioner, Davis, Reno & Courtney, and the respondents, Don Herr, Joe Wilson, Michael Garrison, Paul Gilbrook, Hal Raphael, Dana Bowler, Charles V. Smith, Craig Schweisinger, Tony Lam, Don S. Anderson, John T. Demonaco, Brian Mayhew, Robert Huntley, Charmayne Bohman, Richard Jones, and the City of Westminster, California.

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## CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Davis, Reno & Courtney respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The City of Westminster, California, has filed a petition for a writ of certiorari to review this same judgment. The City's petition was placed on the Court's docket on September 20, 1999, as Case No. 99-465.

## OPINIONS BELOW

The original opinion of the Court of Appeals for the Ninth Circuit is reported at 177 F.3d 839. The opinion was amended (at 1999 WL 496486) and the amended opinion is reprinted in the Appendix to the City's petition at pages 1-79. The order of the United States District Court for the Central District of California granting in part and denying in part cross-petitioner Davis, Reno & Courtney's motion for judgment awarding attorneys' fees and costs is unreported and is reprinted in the Appendix hereto at pages 1-47, *infra*. The judgment is reprinted in the Appendix hereto at page 48, *infra*.

## JURISDICTION

The Ninth Circuit rendered its decision on May 21, 1999. The Ninth Circuit denied a timely petition for rehearing and rehearing en banc and issued an amended opinion on July 15, 1999. See Appendix to City's petition

at 3-4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides, in relevant part, as follows:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs,. . . .

## STATEMENT OF THE CASE

This cross-petition requests review of a decision of the Court of Appeals for the Ninth Circuit affirming in part and reversing in part a District Court judgment that the City of Westminster, California, and various City officials violated 42 U.S.C. § 1983 by disciplining 24 of the City's former employees in retaliation for activities protected by the First Amendment, and affirming in part and reversing in part the District Court's award of attorneys' fees under 42 U.S.C. § 1988.

The former employees were represented at trial by the law firm of Davis, Reno & Courtney – the cross-petitioner herein – which had been retained to represent them by their union, Local 2425 of the International Association of Fire Fighters, AFL-CIO.

Davis, Reno & Courtney represented Local 2425 from 1982 to 1997 on a variety of matters. (Appellants' Excerpts of Record ("ER") 64; Trial Court Docket Sheet ("TCDS") 386; Intervenor's Excerpts of Record ("Int. E.R.") 343-345; Declaration of Alan C. Davis in Support of Motion for Intervention ("Davis Dec."): Ex. F.) Davis, Reno & Courtney consistently billed Local 2425 each month for the services of its attorneys at the firm's normal hourly rates. (Int. ER 344, 347; Davis Dec.: Ex. F.) Local 2425 paid Davis, Reno & Courtney on a regular basis in response to those billings until January 1995. Local 2425 thereafter become very irregular in its payments, and fell further and further behind in the succeeding months as the costs of this litigation sharply escalated. (ER 65; TCDS 386; Int. ER 330; Davis Dec.) Because this litigation was consuming a substantial portion of the law firm's resources and Local 2425 was no longer paying its bills, Davis, Reno & Courtney began to experience severe financial strains.

In June and early July 1995, the District Court bifurcated the trial in this action into two separate phases. Trial of the claims of six plaintiffs was set for July 1995. Trial of the claims of the remaining 18 plaintiffs was set for March 1996. (Int. ER 418; TCDS 362; ER 65; TCDS 386.)

Shortly before the first trial was to commence, the City dissolved its fire department and contracted for fire

protection services with the Orange County Fire Authority. Local 2425's members were absorbed by that Authority and joined a different local affiliate of the International Association of Fire Fighters. Accordingly, Local 2425 no longer had any revenue from membership dues for payment of the substantial fees it already owed to Davis, Reno & Courtney for the services the firm had already provided on the plaintiffs' behalf, or for further services in connection with this litigation. (ER 66; TCDS 386.)

Prior to the beginning of the trial on July 28, 1995, and during a recess in the trial, senior partner Alan Davis of Davis, Reno & Courtney repeatedly explained to the six plaintiffs whose claims were being tried that the firm was experiencing severe financial strains because of the litigation and the dissolution of Local 2425, that the firm's financial arrangement had been with Local 2425, not the individual plaintiffs, and that the firm needed to reach an agreement on payment for legal services with the individual plaintiffs because Local 2425 was no longer paying the firm's bills. (ER 66; TCDS 386.) Davis was repeatedly asked by the plaintiffs to defer any discussion of fee arrangements with them until the trial ended. (ER 66; TCDS 386.) Because Davis believed it would be unfair to the six plaintiffs to seek a continuance on the eve of trial, he acceded to this request. (ER 66; TCDS 386.)

After entry of judgment in favor of two of the plaintiffs, the District Court determined that attorneys' fees should be awarded pursuant to 42 U.S.C. § 1988 in the amount of $977,166.68, as reasonable compensation for the services that Davis, Reno & Courtney had performed on their behalf. App. at 3, *infra*.

Davis, Reno & Courtney requested the District Court to grant the fee award directly to it rather than to the plaintiffs. App. at 42, *infra*. The District Court denied that request. Citing *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990), the District Court stated that § 1988 authorizes an award of fees and costs to a prevailing party, not to that party's attorney, and that Davis, Reno & Courtney must obtain its fees and costs from its client. *Id.* However, Davis, Reno & Courtney could not obtain its fees and costs from Local 2425 – which had been Davis, Reno & Courtney's actual client – since Local 2425 was effectively defunct and the fee award had been granted to the plaintiffs rather than to Local 2425. As noted above, Local 2425 had originally retained Davis, Reno & Courtney to represent the plaintiffs and Local 2425 had initially paid Davis, Reno & Courtney for its services on the plaintiffs' behalf. None of the plaintiffs ever directly paid Davis, Reno & Courtney a penny for the services it performed for them.

When the plaintiffs then refused the law firm's request that they assign a portion of the fee award to the law firm in the amount sufficient to recompense the law firm for its billings that had not been paid by Local 2425, Davis, Reno & Courtney withdrew as their counsel of record. (TCDS 522-528.)

The City and the unsuccessful plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit granted leave to Davis, Reno & Courtney to intervene in the appeal to protect its interest in the fee award. In its decision on the appeal, the Ninth Circuit affirmed the judgment in favor of the two plaintiffs and upheld the District Court's determination to

grant the fee award to those plaintiffs rather than to Davis, Reno & Courtney. Citing *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Ninth Circuit stated

> First, the Supreme Court of the United States has spoken with respect to fees under § 1988. As the Court said unequivocally in *Jeff D.*, Congress chose not to "bestow[ ] fee awards upon attorneys." 475 U.S. at 731-32. No policy argument and no Ninth Circuit case can override the Supreme Court's interpretation.

App. to City's Petition, at 69.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

### I.

### THE WOODEN RULE WHICH THE NINTH CIRCUIT HAS ADOPTED IN THIS CASE THAT FEE AWARDS UNDER 42 U.S.C. § 1988 ARE ALWAYS TO BE GRANTED TO THE PLAINTIFFS RATHER THAN TO THEIR ATTORNEYS THWARTS THE ENDS OF JUSTICE, CONTRAVENES THE CONGRESSIONAL PURPOSE UNDERLYING THE STATUTE, AND MISAPPLIES THE DECISIONS OF THIS COURT

The Ninth Circuit's decision in this case transforms the District Court's "reasonable attorney's fee" award based on the work performed by Davis, Reno & Courtney into a windfall of additional monetary recovery for the prevailing plaintiffs which represents absolutely nothing they have done or earned, nor any harm they have suffered.

As shown below, this decision reflects an inconsistency in this Court's jurisprudence that is causing great confusion among the lower courts. Because of this inconsistency, the Ninth Circuit has erroneously concluded that it must apply 42 U.S.C. § 1988 in a manner that thwarts the ends of justice and contravenes the congressional purpose underlying the statute by discouraging attorneys from undertaking meritorious civil rights litigation.

Certiorari should therefore be granted in order to secure uniformity of decision on an important question of federal law and eliminate further expansion of an erroneous interpretation of 42 U.S.C. § 1988 that seriously threatens the private enforcement of fundamental civil rights.

Prior to the enactment of 42 U.S.C. § 1988 in 1976, the Circuit Courts of Appeals recognized that awarding any part of a court-awarded fee to a litigant who had not paid – and had no obligation to pay – any fees to his or her counsel would confer an unjustified windfall on that litigant.

The seminal decision on this point appears to have been the Fifth Circuit's decision in *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), which involved claims of racial discrimination in the operation of an amusement park. In reversing the trial judge's refusal to grant an award of attorney's fees under Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., the Fifth Circuit stated at 426 F.2d 538-539 as follows:

> . . . Fun fair insists that no fees at all can be awarded since there is no showing that the

named Plaintiffs were or are obligated to pay attorney fees. But this again ignores the structure of the Act and the vital role the allowance of attorney fees plays.

What is required is not an obligation to pay attorney fees. Rather what – and all – that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation, . . .

Any other approach would call either for a fictional formal agreement by persons legislatively recognized as frequently unable to pay for such services . . . or a frustration of the congressional scheme to effectuate the policies of the Act through private suits in which, of course, an attorney is a practical necessity . . .

Administratively, no difficulties arise. Under the statute the attorney fees are allowed "as part of the costs". . . . This and the general equitable powers of the Court, will assure that the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class.

In *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974) the Ninth Circuit adopted the Fifth Circuit's reasoning in *Miller*. The plaintiff had been represented without charge by the American Civil Liberties Union. The District Court denied the ACLU's motion for an award of attorneys' fees under the common law "Private Attorney General" doctrine. Citing *Miller*, the Ninth Circuit reversed. It explained at 494 F.2d 889:

. . . [T]he fact that the plaintiff was not obligated to pay the ACLU for its services is not a bar to an award of attorneys' fees. All that is

> required is the existence of an attorney-client relationship.

Again citing *Miller*, the Ninth Circuit expressly stated at 494 F.2d 889 that the fee award should be paid to the plaintiff's lawyers to "ensure against a windfall to the litigant":

> . . . Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant.

The legislative history of § 1988 shows that Congress was aware of – and intended by the enactment of that statute to endorse – the District Court's decision in *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), that *the plaintiff's law firm* was to be granted a fee award calculated in the same manner that an attorney is traditionally compensated by a fee-paying client. S. Rep. No. 94-1011, p. 6 (1976).

That District Court decision held in pertinent part as follows:

> In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by . . . a privately funded non-profit public interest law firm. It is in the interest of the public that *such law firms be awarded* reasonable attorney's fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees. . . . Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, *plaintiffs' counsel* are entitled to an award of fees . . .

*Davis v. County of Los Angeles, supra,* 8 E.P.D. at 5048-5049 (emphasis added).

After citing this decision and other decisions to the same effect, the Senate Report expressly indicated that the purpose of the statute is to provide fees *to attorneys* in amounts that are reasonable for the services they have performed, and that are not windfalls.

> These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep. No. 94-1011, p. 6 (1976).

The Senate Report also indicated that fee awards should be granted to litigants rather than their attorneys when the litigants have obligated themselves to pay for their attorneys' services.

> If private citizens are to be able to assert their civil rights, . . . then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, p. 2 (1976).

Nothing in the legislative history of 42 U.S.C. § 1988 supports the proposition implicit in the Ninth Circuit's decision in this case that Congress intended to produce windfalls for private citizens by permitting them to recover a fee award when they have neither paid any fees to their attorneys nor obligated themselves in any way to pay their attorneys' fees. Instead, as shown above, Congress intended for the term "attorney's fee" to be given its literal interpretation, i.e., the fee to be paid to an attorney.

Other contemporaneous developments compel the same conclusion. One year after the enactment of 42 U.S.C. § 1988, the California Supreme Court observed in *Serrano v. Priest*, 20 Cal.3d 25 (1977) that the federal courts had adopted the rule – in the decisions cited above and others – that trial courts have equitable powers to grant a statutory fee award directly to the plaintiffs' attorney rather than to the plaintiffs themselves. The Court then declared that California's state courts have the same discretion.

> The propriety of a direct award to the plaintiffs' attorney, rather than to plaintiffs themselves, in the exercise of the court's equitable powers, is no longer questioned in the federal courts. [Citations omitted.] The equity powers of California courts are no less expansive in this respect. [Citations omitted.]

*Id.*, at 47 n.21.[1]

The Ninth Circuit reaffirmed its adoption of this principle – that where the plaintiff has paid no fees, a statutory fee award should be granted directly to the plaintiff's attorney to avoid a windfall to the litigant – in 1980 in *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980),

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[1] On September 1, 1999, the California Supreme Court granted a petition for review of a decision to the contrary by the Court of Appeal of the State of California for the First Appellate District. The case is titled *Flannery v. Prentice*, and is Case No. S080150 in that court. The Court of Appeal held in that case that a fee award under California's Fair Employment and Housing Act, Cal. Gov. Code §§ 12900 *et seq.*, is to be granted to the prevailing plaintiff rather than to her attorneys, and reversed the trial court's decision that her attorneys are entitled to the award.

which involved an award of attorneys' fees under 42 U.S.C. § 1988, and in 1981 in *Kessler v. Associates Financial Services Company of Hawaii, Inc.*, 639 F.2d 498 (9th Cir. 1981), which involved an award of attorneys' fees under the Truth in Lending Act, 41 U.S.C. §§ 1601 et seq.

However, several other Circuit Court of Appeals decisions interpreted 42 U.S.C. § 1988 as requiring that any award of attorney's fees under that statute be made to the prevailing party, rather than the party's attorney. *See* cases cited in *Evans v. Jeff D., supra*, 475 U.S. 717, at 730 n.19.

This Court's decision in *Evans v. Jeff D., supra*, 475 U.S. 717, recognized but did not definitively resolve the split between the circuits on this issue. Although the Court declared at pp. 730-731 that Congress did not expect that fee awards under 42 U.S.C. § 1988 were to be bestowed upon attorneys, the Court stated in footnote 2 at 475 U.S. 721 that any award of costs and fees in that case would "inure to the benefit of" the legal aid society that had represented the prevailing parties.

The Court thus acknowledged in *Jeff D.* that there can be facts and circumstances under which a fee award under 42 U.S.C. § 1988 should not be granted to the prevailing parties but instead should be granted directly to their attorneys.

This acknowledgment was consistent with the Court's earlier statement in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), at p. 435, that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee" and with the Court's earlier decision in *Blum v. Stenson*, 465 U.S. 886 (1984), which was manifestly

based on the presumption that where a legal aid society has successfully prosecuted a class action, a fee award under 42 U.S.C. § 1988 is to be made to the legal aid society rather than to the class members, even though the legal aid society is not a party to the lawsuit. *See* 465 U.S. at 888-889 ("The two issues in this case are whether Congress intended fee awards to nonprofit legal service organizations to be calculated according to cost or to prevailing market rates,. . . . ) and 465 U.S. at 892 ("The Solicitor General, for the United States as amicus curiae, urges the Court to adopt a cost-related standard only for fee awards made to non-profit legal aid organizations.").

Moreover, review of the entire decision in *Jeff D.* and the facts presented therein makes clear that the Ninth Circuit is in error in its interpretation of that decision as establishing the wooden rule that attorney's fees awarded under 42 U.S.C. § 1988 are always to be granted to the prevailing plaintiffs rather than their attorneys unless the prevailing plaintiffs have executed a fee agreement assigning the award to counsel.

*Jeff D.* was a class action prosecuted by the Idaho Legal Aid Society, a private, nonprofit corporation that provides free legal services to qualified low-income persons. The plaintiffs in the case were children suffering from emotional and mental handicaps who had been placed in the care of the State. The complaint alleged that the State's educational and health care services for these children did not meet constitutional and statutory standards. *Id.*, 475 U.S. at 720-724.

The State and the legal aid society entered into a settlement agreement which provided solely injunctive

relief and included a waiver by the class of any claim for recovery of fees and costs from the state. Nevertheless, after the settlement agreement was approved by the District Court, the legal aid society moved for an award of attorneys' fees under 42 U.S.C. § 1988. The District Court denied the motion. *Id.*

This Court affirmed the denial of a fee award to the legal aid society. The Court declared that the representative of the class (which was the legal aid society itself, *see* 475 U.S. at 721) had the authority to waive a fee award because Congress had bestowed the eligibility for a discretionary award of attorneys' fees on the "prevailing *party*" (generally plaintiffs). *Id.*, 475 U.S. at 730-731.

However, the Court apparently realized that a wooden rule that fee awards under 42 U.S.C. § 1988 are to be granted to the plaintiffs rather than their attorneys could lead to the absurd result that fee awards in similar cases would be divided up and paid out in equal parts to each of the mentally and emotionally handicapped children in the class.

It would obviously be impossible for a legal aid society or other organizations with similar purposes to somehow recover the award from all of those children. The children would wind up receiving a windfall while their attorneys would be deprived of the fees to which the trial court had found that they were rightfully entitled for the services they had performed.

Accordingly, as noted above, the Court stated in footnote 2 at 475 U.S. 721 that if there were to be a fee award notwithstanding the waiver in the settlement agreement, the fee award would "inure" to the legal aid society

rather than to the class of mentally and emotionally handicapped children.

The Court explained at 475 U.S. 730-731 that under circumstances such as these, where there was no fee agreement between the plaintiffs and their attorney and the plaintiffs had not paid any fees to their attorney to prosecute the case on their behalf, a fee award under 42 U.S.C. § 1988 would be deemed to have been "effectively" assigned to the legal aid society.

Thus, although this Court stated on the one hand in *Jeff D.* that Congress bestowed fee awards on the prevailing parties rather than on their attorneys, the Court stated on the other hand that under the facts and circumstances of that particular case, a fee award should not be granted to the plaintiffs but rather to the organization whose attorneys represented them.

Unfortunately, this Court's subsequent decision in *Venegas v. Mitchell, supra,* 495 U.S. 82, seemingly created an inconsistency in this Court's jurisprudence by emphasizing the proposition that "it is the party, rather than the lawyer" who is eligible for fees under 42 U.S.C. § 1988, without any discussion of whether the District Courts nevertheless may, in the exercise of their equitable jurisdiction, grant a fee award directly to counsel. *Id.*, at 87. Although *Venegas* decided the entirely different issue of whether an attorney may enforce a contingent-fee agreement under which the attorney receives an amount greater than the statutory award, this emphasis caused the Ninth Circuit to erroneously interpret *Venegas* and *Jeff D.* as establishing that the District Court lacked any discretion to make a determination – taking the facts and

circumstances of this case into account – of whether its fee award should be granted to Davis, Reno & Courtney and Local 2425 rather than to the two successful plaintiffs.

The wooden rule thus adopted by the Ninth Circuit in this case – that fee awards under 42 U.S.C. § 1988 must always be granted to the prevailing parties rather than to their attorneys in the absence of a fee agreement assigning the award to counsel – neither serves the interests of justice nor accomplishes the congressional purposes underlying the statute, but instead seriously threatens the private enforcement of fundamental civil rights by making it substantially more difficult for lawyers to receive reasonable compensation for civil rights litigation.

As the Ninth Circuit itself observed in *United States v. Jerry M. Lewis Truck Parts & Equipment*, 89 F.3d 574 (9th Cir. 1996):

> The work was done by and the fees are for the plaintiff's attorney. They must be directed to the attorney. Were the rule otherwise, plaintiffs would obtain possession of fee awards, and attorneys would be left to attempt to obtain the money paid for their services as best they could. Left to the normal vicissitudes of life, substantial sums would be diverted from their intended purpose.

*Id.*, at 578-79.

The evil of this wooden rule becomes particularly apparent when it is applied to civil rights class actions.

Congress clearly had class actions in mind when it adopted 42 U.S.C. § 1988. *See Blum v. Stenson, supra*, 465

U.S. 886, 893-895. Class actions are commonly brought by attorneys who do not – and in most cases could not as a practical matter – have fee agreements with the unnamed members of the class assigning any statutory fee award to counsel. The wooden rule that fee awards under 42 U.S.C. § 1988 are to be granted to the plaintiffs rather than their attorneys in the absence of an agreement assigning any fee award to counsel thus leaves the attorneys for the prevailing parties in a civil rights class action with no practical means for recovering the fees determined by the trial court as reasonable compensation for their services.

Because the Ninth Circuit has concluded in this case that no other result is permitted by the decisions of this Court in *Evans v. Jeff D., supra,* 475 U.S. 717, and *Venegas v. Mitchell, supra,* 495 U.S. 82, this Court should grant certiorari and resolve the apparent inconsistency in its jurisprudence by reaffirming the principle implicit in *Hensley v. Eckerhart, supra,* 461 U.S. 424 and *Blum v. Stenson, supra,* 465 U.S. 886, that the District Courts may, in the exercise of their general equitable powers, grant fee awards under 42 U.S.C. § 1988 directly to the attorneys whose services are the basis for the award, or, where labor unions, legal aid societies, or civil rights organizations have actually paid the costs of the litigation, directly to those organizations, rather than to the plaintiffs.

## II.

## THE NINTH CIRCUIT'S DECISION IN THIS CASE IS IN CONFLICT WITH OTHER CIRCUIT COURT OF APPEALS DECISIONS RECOGNIZING THAT THE DISTRICT COURTS HAVE DISCRETION TO GRANT A STATUTORY FEE AWARD DIRECTLY TO THE ATTORNEY WHOSE SERVICES WERE THE BASIS FOR THE AWARD

Certiorari should also be granted to resolve a conflict between the Circuit Courts of Appeals on the question of whether, and under what circumstances, the District Courts have discretion to grant a statutory fee award directly to the attorney whose services were the basis for the award.

The Ninth Circuit has itself recently recognized in cases involving other fee-shifting statutes that the District Courts may, in the exercise of their general equitable powers, grant a fee award directly to the attorneys whose services are the basis for the award, or, where labor unions, legal aid societies, or civil rights organizations have actually paid the costs of the litigation, directly to those organizations, rather than to the plaintiffs.

In *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1263 (9th Cir. 1993) the Ninth Circuit held that an award of attorneys' fees under the Truth in Lending Act, 41 U.S.C. §§ 1601 et seq., was to be granted to the plaintiff if the plaintiff was a paying client of the legal aid society of Hawaii, whose attorneys had represented him; otherwise the award was to be granted to the Society.

Similarly, in *United States v. Jerry M. Lewis Truck Parts & Equipment, supra*, 89 F.3d 574, the Ninth Circuit held

that where the District Court had granted an award of attorneys' fees under the False Claims Act, 31 U.S.C. §§ 3729 et seq., "[u]nder no condition was [the plaintiff] entitled to receive direct payment of those fees from [the defendant]" (89 F.3d at 579) because "[t]he work was done by and the fees are for the plaintiff's attorney." *Id.*

The Ninth Circuit stated in *Jerry M. Lewis* that payment of a fee award directly to the attorney rather than to the prevailing party is consistent with this Court's holding in *Evans v. Jeff D., supra,* 475 U.S. 717, because a prevailing party has the *power* to seek fees under the fee-shifting statutes, but if that party has paid no fees, the prevailing party's attorney has the right to *receive* those fees:

> "[O]nly the plaintiff has the power to demand that the defendant pay the fees of the plaintiffs' attorney. Unless and until the plaintiff exercises that power, no one has the right to collect fees from the defendant, and the defendant has no duty to pay them. Once the power is exercised, however, the attorney's right vests, and the defendant's duty becomes fixed. [Citation omitted.]

89 F.3d at 578.

*See also Image Technical, Inc. v. Kodak,* 136 F.3d 1354, 1359 (9th Cir. 1998) (fee award denied to prevailing party in action brought under the Clayton Act, 15 U.S.C. §§ 12 et seq., because the prevailing party's attorney was disqualified from receiving the award as the result of an ethical violation and granting the award to the client would result in a sizable, unjustified windfall), and *Samuels v. American Motors Sales Corp.,* 969 F.2d 573, 576-577

(7th Cir. 1992) (attorney recognized as having standing to pursue appeal of amount of fees awarded under Magnuson-Moss Act, 15 U.S.C. §§ 2301 et seq., despite the fact that he was discharged by his client before the appeal).

This Court held in *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) that "our case law construing what is a 'reasonable' fee applies uniformly to all of [the fee-shifting statutes]." However, as shown above, the Ninth Circuit and other Circuit Courts of Appeals have concluded on the one hand that the District Courts may grant fees awarded under other fee-shifting statutes directly to the attorneys whose services are the basis for the award, or directly to labor unions, legal aid societies, or civil rights organizations when those organizations paid the costs of the litigation, rather than to the plaintiffs, but have concluded on the other hand that the District Courts lack any such discretion when fees are awarded under 42 U.S.C. § 1988. The Court should therefore grant certiorari and declare that the District Courts may, in the exercise of their general equitable powers, grant fee awards under all federal fee-shifting statutes directly to the attorneys whose services are the basis for the award, or, where labor unions, legal aid societies, or civil rights organizations have actually paid the costs of the litigation, directly to those organizations, rather than to the plaintiffs.

## III.

## THE NINTH CIRCUIT'S DECISION OFFENDS ETHICAL RULES THAT PROHIBIT NON-LAWYERS FROM RECEIVING OR SHARING A LAWYER'S FEE

Additionally, certiorari should be granted to settle the equally important question of whether the Ninth Circuit's decision offends ethical rules that prohibit non-lawyers from receiving or sharing a lawyer's fee.

It is well established in California, as in most states, that "no one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar." *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal.4th 119, 127 (1998), quoting with approval *Hardy v. San Fernando Valley Chamber of Commerce*, 99 Cal.App.2d 572, 576 (1950).

Similarly, a lawyer may not share legal fees with a non-lawyer. *See* Cal. Rules Prof. Conduct, rule 1-320 (attorneys shall not "directly or indirectly share legal fees with a person who is not a lawyer"); *In re Arnoff*, 22 Cal.3d 740 (1978); *Gassman v. State Bar*, 18 Cal.3d 132 (1976).

A pro se litigant who is the prevailing plaintiff in a civil rights action is not entitled to a fee award under 42 U.S.C. § 1988, even if the litigant is an attorney. *Kay v. Ehrler*, 499 U.S. 432, 435-37 (1991). If pro se litigant-attorneys are not entitled to fee awards for legal services they perform for themselves, it would logically follow that litigants who are not attorneys are not entitled to fee awards in excess of their actual costs for the legal services

performed for them by their attorneys. Accordingly, in *National Treasury Employees' Union v. Dept. of Treasury*, 656 F.2d 848 (D.C.Cir. 1981), the Court of Appeals for the District of Columbia refused to award market-rate fees for the work of salaried, in-house labor union attorneys in a case in which the union was entitled to a statutory fee award because the amount of those fees in excess of the actual costs to the union for the services of its attorneys would have gone to the union's general fund rather than to a fund earmarked for legal services. The court explained that allowing the non-lawyer client to receive legal fees in excess of its actual costs would constitute improper fee-splitting and sanction the unauthorized practice of law. *Id.*, at 851. *See also Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992); *Keener v. Dept. of the Army*, 136 F.R.D. 149, *aff'd mem.*, 956 F.2d 269 (6th Cir. 1992) (agreement of attorney to split fee award with client "patently unethical").

Other Circuit Courts of Appeal have held to the contrary. *See Central States v. Central Cartage Co.*, 76 F.3d 114, 116 (7th Cir. 1996), and *Turner v. Secretary of Air Force*, 944 F.2d 804, 807 (11th Cir. 1991) (both holding that the fee award is not the lawyer's to begin with, so there can be no fee-splitting objection).

As shown above, Congress intended that a "reasonable attorney's fee" award under 42 U.S.C. § 1988 is to be, in fact, an attorney's fee rather than a windfall to the litigant. The Court should therefore settle this conflict between the circuits by granting certiorari in this case and declaring that the fee awards granted to litigants or, in this case, their labor union, may not exceed the amounts which they have paid or are obligated to pay to

their attorneys, and that, in the exercise of their equitable powers, the District Courts are to grant fee awards in excess of those amounts directly to their attorneys rather than to the litigants.

## IV.

## AS A MATTER OF SOUND JUDICIAL ADMINISTRATION, THIS COURT SHOULD ESTABLISH THE RULE THAT DISPUTES BETWEEN ATTORNEYS AND THEIR CLIENTS OVER STATUTORY FEE AWARDS SHOULD BE RESOLVED BY THE TRIAL JUDGE WHO HEARD THE CASE RATHER THAN IN COLLATERAL LITIGATION IN A DIFFERENT COURT

Finally, certiorari should be granted in order that this Court may establish as a matter of sound judicial administration that disputes between attorneys and their clients over statutory fee awards should be resolved by the trial judge who heard the case rather than in collateral litigation in a different court.

In the event this Court reverses the decision of the Ninth Circuit herein and holds, in accordance with its jurisprudence prior to *Venegas v. Mitchell*, that fee awards under 42 U.S.C. § 1988 are not exclusively the property of the litigant, then, in this case and others of a similar nature, an issue may arise as to the proper apportionment of the award between the attorney and a fee-paying client. It has been held that the District Courts have jurisdiction not only to determine the amount of a fee award to be paid by a defendant but also the amount of the fee to be charged to the plaintiff by his or her attorney. *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985). As a

matter of policy and judicial economy, it would be wasteful and inefficient to require the parties to litigate that issue in a different court through a different lawsuit. The trial judge will know the nature of the underlying dispute and the nature of the representation provided by the attorney. Since the trial judge will have made a determination of the amount that constitutes a "reasonable attorney's fee," requiring the attorney to prove entitlement to that amount in a different proceeding for a recovery from the plaintiff on the basis of quantum meruit makes little sense. Accordingly, in order to avoid the likelihood of wasteful satellite litigation, a multiplicity of lawsuits, and potentially conflicting rulings, this Court should hold that the District Courts, in the exercise of their equitable jurisdiction, are to resolve any disputes that may arise between attorneys and their clients over the disposition of statutory fee awards.

## CONCLUSION

For all of the reasons set forth above, this cross-petition for writ of certiorari should be granted.

Respectfully submitted,

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DUANE W. RENO
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ALAN C. DAVIS
FRANCES C. FORT

*Pro Se*

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| PAUL GILBROOK, et al.,<br>Plaintiffs,<br>v.<br>CITY OF WESTMINSTER, et al.,<br>Defendants. | CASE NO. CV 94-2051 RAP (VAP)<br>ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR JUDGMENT AWARDING ATTORNEYS' FEES AND COSTS<br>(Filed Jan. 22, 1997) |

## I. Introduction

This civil rights action arose out of the turbulent relationship between certain elected officials of the City of Westminster[1] and the Westminster City Firefighters Association and its members. The gravamen of plaintiffs' claims was that plaintiffs were unconstitutionally disciplined in retaliation for mounting a recall election against

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[1] Defendants include the City of Westminster, as well as the following present and former city officials: Charles V. Smith (Mayor), Craig Schweisinger (City Counsel member), Charmayne Bohman (City Counsel member), Tony Lam (City Counsel member), Jerry Kenny (City Manager), Robert J. Huntley (Interim City Manager), Don S. Anderson (Assistant City Manager), John T. Demonaco (Fire Chief), Richard Jones (City Attorney) and Brain [sic] Mayhew (City's Finance Director).

several city counsel members and then actively campaigning against them during the recall election. Plaintiffs claimed defendants' conduct violated their First and Fourteenth Amendment rights and that defendants slandered plaintiff Gilbrook.

The case was divided into two separate trials: Plaintiffs Gilbrook, Garrison, Herr, Raphael, Wilson and Bowler's claims were tried first.[2] This first trial was conducted in three phases: liability, damages, and *Monell* liability, respectively. In the first two phases, the jury imposed liability on defendants Smith, Schweisinger, Lam, Anderson, Demonaco and Mayhew. Plaintiffs were awarded both compensatory and punitive damages. The Court then found the City liable under *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018 (1978).

Upon defendants' post-trial motions pursuant to Fed. R. Civ. P. Rules 50(b) and 59, the Court granted defendants' Rule 50(b) motion for judgment as a matter of law as to plaintiffs Herr, Raphael, Bowler and Wilson's equal protection claims; treated defendants' Rule 50(b) motion for judgment as a matter of law as to plaintiff Bowler's First Amendment retaliation claim as a motion for a new trial, and granted that motion for a new trial; and denied defendants' Rule 50(b) motion for judgment as a matter

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[2] At the time of the first trial, the other plaintiffs included Binks, Blain, Garland, Jones, Kolb, Kungle, Long, Macpherson, Metzer, Mitchell, Nelson, Pasternak, Purcell, Reese, Richards, Speth, Surkin, and Wilkinson. Since that time, certain of these plaintiffs have decided not to pursue their claims against defendants.

of law in all other respects. In addition, the Court conditionally granted defendants' Rule 59 motion for a new trial on plaintiffs Herr, Raphael, Bowler and Wilson's equal protection claims pursuant to Rule 50(c); and granted defendants' Rule 59 motion for a new trial as to the punitive damage award against defendants Demonaco, Mayhew, and Smith unless plaintiffs accepted a remittitur of the punitive damages to $60,000 against Demonaco ($15,000 to Herr, Raphael, Bowler and Wilson each); $40,000 against Mayhew ($18,750 to Herr, Raphael, Bowler, and Wilson each); and $100,000 against Smith ($25,000 to Herr, Raphael, Bowler, and Wilson each).[3] As to Raphael and Bowler's punitive damage awards, the Court conditionally granted a new trial pursuant to Rule 50(c). The Court denied defendants' Rule 59 motion for a new trial in all other respects.

Pending before the Court is plaintiffs' Motion for Judgment Awarding Attorneys' Fees and Costs ("Motion") in the amount of $2,803,971.08. For the reasons articulated below, plaintiffs' Motion is **GRANTED** and plaintiffs are awarded reasonable attorneys' fees and costs in the amount of $977,166.68.

## II. Standard

In a case brought under 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. In the Ninth Circuit, § 1988 entitles a plaintiff to an award of attorneys' fees when (1)

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[3] Plaintiffs accepted the remittitur.

the plaintiff wins on the merits, "(2) the relief received materially alters the legal relationship between the parties by modifying the defendant's behavior, and (3) the relief directly benefits the plaintiff." *Trevino v. Gates, et al.*, 99 F.3d 911, 925 (9th Cir. 1996) (quoting *Martinez v. Wilson*, 32 F.3d 1415, 1422 (9th Cir. 1994)).

The reasonableness of attorneys' fees in a particular case is typically determined according to the lodestar method.[4] *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Id.; Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). The lodestar figure is presumptively reasonable and may only be adjusted on the basis of those reasonableness factors not already subsumed in the lodestar calculation.

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[4] In *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), the Ninth Circuit adopted the Fifth Circuit's list of twelve factors bearing on the reasonableness determination:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skills requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

*Id.* at 364 n. 8; *see also Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

*Id.* at 363-64; *see also Cunningham*, 879 F.2d at 487 (noting adjustment of lodestar based on unsubsumed factors is appropriate only in rare and exceptional cases where supported by specific evidence in record and detailed findings).[5] "[W]here a factor is generally considered as part of the lodestar, further adjustment based on that factor will ordinarily amount to impermissible double counting. . . . " *Id.* at 488.[6]

## IV. Discussion

A district court has discretion to determine the amount of a fee award, but it is required to "provide a concise but clear explanation of its reason for the fee award." *Gates*, 987 F.2d at 1398 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

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[5] "Only in rare instances should be lodestar figure be adjusted on the basis of other considerations." *Id.* (citing *Harris v. Marhoefer*, 24 F.3d 16, 18 (1994). "Adjusting the lodestar on the basis of [reasonableness factors subsumed in the determination of the lodestar] instead of adjusting the reasonable number of hours or reasonable hourly rate at the first step, i.e. when determining the lodestar, is a disfavored procedure." *Id., n. 9 (citing Corder v. Gates*, 947 F.2d at 378).

[6] The Ninth Circuit has specifically concluded that inadequate documentation, quality of representation and results obtained are subsumed in the lodestar determination. *Cunningham*, 879 F.2d at 487-88.

### A. Challenges to Number of Hours Claimed[7]

The general rule in the Ninth Circuit is that

> plaintiffs are to be compensated for attorney's fees incurred for services that contribute to the ultimate victory in the lawsuit. . . . Just as time spent on losing claims can contribute to the success of other claims, time spent on a losing stage of litigation contributes to success because it constitutes a step toward victory.

*Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991). Thus, "a plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage." *Id.* at 1053. Defendants challenge plaintiffs' claim for attorneys' fees on several bases. The parties dispute whether plaintiffs may be compensated under § 1988 for certain phases of litigation and efforts arising from the same facts as the civil rights litigation. Where appropriate, the Court considers whether a particular phase was a necessary step to the ultimate victory of the prevailing plaintiffs.

#### 1. Arbitration

Early on in this litigation, plaintiffs were successful in compelling defendants to participate in arbitration proceedings at which the plaintiffs sought reinstatement

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[7] Plaintiffs' summary chart of claimed hours and rates, prepared at the request of the Court, is attached as appendix A to this order.

or reversal of disciplinary decisions.[8] However, the plaintiffs later agreed to suspend the arbitrations pending resolution of this action. After the Westminster Fire Department was disbanded and the city contracted out fire services to the Orange County Fire Authority ("OCFA"), meaningful relief was no longer available from arbitration, and plaintiffs abandoned their pursuit of relief in that forum. In challenging plaintiffs' claim for attorneys' fees, defendants seek to exclude all time that involved plaintiffs' motion to compel arbitration and all time spent participating in or preparing for the arbitration hearings.

The Supreme Court's pronouncements on the question of whether plaintiffs may recover attorneys' fees under § 1988 for a related arbitration proceeding reiterate the fact that district courts have discretion to determine the amount of a fee award, and include or reject time spent pursuing optional administrative remedies. *Webb v. Bd. of Educ. of Dyer County, Tennessee*, 471 U.S. 234, 243 (1985). Nonetheless, a plaintiff is not automatically entitled to attorneys' fees for time spent in the administrative process where the rights to be adjudicated by the administrator are not a part of the § 1983 proceedings. *Id.* at 241.

Looking to the legislative history of § 1988, the Supreme Court noted numerous references supporting limited approval of extra-judicial efforts, including notations that the statute was passed to promote enforcement of civil rights statutes "in suits," "through the courts,"

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[8] Judge Lew ordered the parties to participate in arbitration and the parties did so, though not to completion.

and by "judicial process." *Id.* at 241 n. 16. Nonetheless, the Supreme Court has approved fee awards that include work in related proceedings that was necessary to advance the civil rights litigation.

> Even if the prior proceeding is not a proceeding to enforce one of the § 1988 civil rights laws, [a court may award attorneys' fees for] the discrete portion of the work product from the administrative proceedings that was both useful and of a type ordinarily necessary to advance the subsequent § 1988 civil rights litigation.

*North Carolina Dept. of Transportation v. Crest Street Community Council*, 479 U.S. 6, 15 (1986) (quoting *Webb* 471 U.S. at 243) (internal quotations omitted); *see also Cullen v. Fliegner*, 18 F.3d 96, 106 (2d Cir. 1994) (approving award for discrete portion of time spent in relation to administrative disciplinary proceeding against plaintiff in civil rights action). For example, where a court finds time spent on a labor arbitration is inextricably linked to the issues before the district court, and the arbitration served the purpose of discovery, the court may include time spent on the arbitration in calculating an attorneys' fee award. *Keenan v. Philadelphia*, 983 F.2d 459, 474 (3d Cir. 1992).

Here, the plaintiffs conducted full-blown discovery without apparent recourse to the arbitration process. Moreover, during trial, plaintiffs' counsel made little, if any, reference to the arbitration proceedings. Likewise, plaintiffs have not argued that by participating in the arbitration proceedings they obtained significant information that furthered the success of the prevailing plaintiffs in this action. Plaintiffs present no evidence that the

labor arbitration proceedings touched on, let alone furthered, plaintiffs' constitutional claims raised before this Court under § 1983. The time spent by plaintiffs' counsel to compel arbitration and prepare for and participate in the arbitration proceedings was not "useful and of a type ordinarily necessary to advance the subsequent § 1988 civil rights litigation." *See Crest Street*, 479 U.S. at 15 (quoting *Webb* 471 U.S. at 243). As a result, plaintiffs are not entitled to recover attorneys' fees for the following hours claimed by plaintiffs:

| | |
|---|---|
| Davis | 317.0 |
| Courtney | 34.3 |
| O'Hara | 141.5 |
| Boltwood | 164.6 |
| Heesch | 0.7 |
| Beebe | 67.6 |
| VJR | 15.7 |
| Kalemis | 0.5. |

**2. Opposition to OCFA Contracting Out Fire Services**

During the course of this litigation, defendant Westminster decided to disband the Fire Department altogether and contract with the OCFA for fire services. Plaintiffs contended that the decision to contract out fire services was part of defendants' retaliation against plaintiffs for their protected conduct. Plaintiffs' counsel expended over 600 hours in attempts to negotiate with defendants, to obtain a temporary restraining order and a

preliminary injunction to convince the OCFA to allow plaintiffs to be reinstated at the OCFA if they prevailed in this action, and to obtain transfers to the OCFA for certain plaintiffs.

Plaintiffs' attempts within the confines of this litigation to prevent the City of Westminster from signing a contract to obtain fire services from the OCFA are compensable under the standard articulated in *Cabrales*. As the Ninth Circuit stated in *Cabrales*, "[l]awsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is part of winning." *Cabrales*, 935 F.2d at 1053. Thus, "time spent on a losing stage of litigation contributes to success because it constitutes a step toward victory." *Id.* at 1052. Efforts to preserve the remedy of reinstatement and efforts to encourage settlement of the case, though ineffective, contributed to the ultimate success in the lawsuit in that they constituted "skirmishes on the way to winning the war." *See id.* at 1053.

Moreover, plaintiffs are entitled to recover attorneys' fees for efforts taken outside the narrow confines of the courtroom to protect the remedy of reinstatement and pressure defendants to settle the case. Addressing the availability of attorneys' fees for extra-litigation efforts such as lobbying, the Ninth Circuit held that a prevailing party may be compensated for those tasks undertaken by civil rights counsel that would be billed by a private attorney and that were directly and intimately related to the successful representation of the client. *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), vacated in part on other grounds, 984 F.2d 345 (9th

Cir. 1993). Plaintiffs' counsel billed plaintiffs for extra-litigation efforts directly and intimately related to protecting reinstatement as a remedy and encouraging settlement. The lobbying and negotiation efforts of counsel were tasks that private attorneys typically undertake and for which private attorneys typically bill their clients. Consequently, the Court finds plaintiffs are entitled to receive attorneys' fees for efforts to prevent the City of Westminster from contracting out fire services to the OCFA.

### 3. Opposition to Indemnification of City Counsel

Defendants contend that time spent by plaintiffs' counsel in efforts to keep the City Council, of which several then-members are defendants in this action, from voting to indemnify defendants for punitive damages was not reasonably spent. Attorneys' fees are reasonably incurred for lobbying that "is directly and intimately related to the successful representation of a client." *Davis*, 976 F.2d at 1545 (finding efforts to lobby board of supervisors compensable as attorneys' fees where district court found obtaining support of board was vital to obtaining consent decree).

Here, plaintiffs' attorneys' efforts were reasonably directed at preventing defendants from shifting the burden of their potential liability for punitive damages for violations of plaintiffs' constitutional rights to city taxpayers. Prevailing plaintiffs sought to vindicate their civil rights, not only by obtaining damages and, if possible, reinstatement, but by holding the violators accountable

for their actions. Efforts to prevent indemnification of the defendants by the City were directly and intimately related to the plaintiffs' goal of making defendants personally accountable for the violations of plaintiffs' civil rights. In addition, plaintiffs' counsel reasonably concluded that successful lobbying to prevent indemnification would pressure defendants to settle with plaintiffs. For each of these reasons, the plaintiffs are entitled to an award of attorneys' fees that includes hours expended on lobbying to prevent indemnification of defendants' for the punitive damages awarded by the jury.

**4. Press Communications and Public Relations**

Defendants challenge as unreasonable time spent by plaintiffs' attorneys on communicating with the press and public relations efforts. Once again, the *Davis* test applies:

> Where the giving of press conferences and performance of other lobbying and public relations work is directly and intimately related to the successful representation of a client, private attorneys do such work and bill their clients. Prevailing civil rights plaintiffs['] [attorneys] may do the same.

*Davis*, 976 F.2d at 1545. However, "public relations work [that] did not contribute, directly and substantially, to the attainment of [plaintiffs'] litigation goals" is not reasonable and may not be compensated under § 1988. *Id.* Here, plaintiffs' asserted violations of their first Amendment rights in the political arena. Local politics had a potentially determinative influence on the outcome of settlement negotiations and the availability of certain remedies

such as reinstatement. Moreover, plaintiffs believed the efforts to disband the Westminster Fire Department were part of the retaliatory scheme, and plaintiffs reasonably used public relations and political lobbying efforts to prevent additional retaliation against plaintiffs prior to the conclusion of this action. Consequently, plaintiffs' efforts to influence public opinion and impact the political arena contributed directly and substantially to the attainment of plaintiffs' litigation goals. Plaintiffs are entitled to the requested attorneys' fees for time spent conversing with the press, lobbying and performing other public relations work.

**5. Clerical Tasks**

Performance of clerical tasks may not be included in hours billed by attorneys or paralegals.

> Purely clerical or secretarial tasks should not be billed at a paralegal or lawyer's rate, regardless of who performs them. The dollar value of such non-legal work is not enhanced just because a lawyer does it. . . . It simply is not reasonable for a lawyer to bill, at her regular hourly rate, for tasks that a non-attorney employed by her could perform at a much lower cost.

*Davis*, 976 F.2d at 1543.

Here, plaintiffs have voluntarily retracted nearly all of their claims for work challenged by defendants as

clerical in nature.[9] Defendants remaining challenges are to Boltwood's expenditure of 6.8 hours indexing the Demonaco deposition transcript, and Courtney's expenditure of 2.4 hours recording her court time. Plaintiffs correctly assert that these tasks were necessarily done by an attorney.

### 6. Client Relations

Likewise, plaintiffs have withdrawn all claimed hours challenged by defendants as time spent on client relations, with the exception of one hour relating to the subcontracting out of fire services to the OCFA. Alan Davis billed that hour for telephone conversations regarding potential conflicts of interest with certain individual plaintiffs. Resolution of a potential conflict of interest is a matter of law firm administration, not work in furtherance of plaintiffs' § 1983 claims. Accordingly, plaintiffs are not entitled to recover attorneys' fees for that hour.[10]

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[9] Defendants voluntarily retracted the following hours:

| | |
|---|---|
| Davis | 7.7 |
| Courtney | 0.4 |
| O'Hara | 0.9 |
| Boltwood | 12.0 |
| Erdman | 6.3 |
| Beebe | 32.0 |
| Courtney III | 22.0. |

[10] Plaintiffs are therefore not entitled to recover:

| | |
|---|---|
| Davis | 12.2 |
| Courtney | 3.0 |
| O'Hara | 0.3 |
| Erdman | 1.0. |

**7. Miscellaneous Tasks**

Defendants challenge plaintiffs' claim for attorney time spent on "miscellaneous activities neither necessary nor useful to the success of the civil rights claims." In reply, plaintiffs eliminated most of the hours originally claimed that were subject to defendants "miscellaneous" challenges.[11] Each of the remaining tasks asserted by plaintiffs' in their calculation of attorneys' fees is reasonable. First, plaintiffs' counsel spent 11.3 hours researching Peat Marwick liability. Research into potential defendants and claims is part of any reasonable lawyer's representation of clients and may be recovered under § 1988. *Cf. Seattle School Dist. No. 1 v. State of Washington*, 633 F.2d 1338, 1349 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1980).

Second, the 2.9 hours spent on analysis of defendants' insurance policies was reasonable given the necessity of understanding the financial landscape in order to represent plaintiffs in settlement conferences and analyze potential damages. Finally, the 2.6 hours billed by Courtney and Davis for meetings with Reno to advise him of the status of the litigation were patently reasonable. Plaintiffs' counsel did not bill for Reno's time during these conferences, and, as plaintiffs point out, it was important to have a partner in the San Francisco office

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[11] Plaintiffs voluntarily retracted the following hours:

| | |
|---|---|
| Davis | 11.4 |
| Courtney | 1.3 |
| O'Hara | 0.8 |
| Boltwood | 9.3 |
| Schlichtmann | 6.9 |
| Kalemis | 1.0. |

who was knowledgeable about the case while Courtney and Davis were working on the case in Los Angeles. *See Finkelstein v. Bergna*, 804 F. Supp. 1235, 1258 (N.D. Cal. 1992) (recognizing reasonableness of holding conferences to facilitate supervision of inexperienced attorneys).

**8. Non-Prevailing Parties**

Section 1988 allows an award of attorneys' fees to a "prevailing party." The core inquiry in assessing whether a party prevailed is whether the outcome effected [sic] "a material alteration of the legal relationship of the parties." *Farrar*, 506 U.S. at 103.

> A litigant need not prevail on every issue, or even the "central issue" in the case, to be considered the prevailing party. It is enough that he [or she] succeed "on any significant claim affording some of the relief sought. . . . The degree of success is irrelevant to the question whether the plaintiff is the prevailing party. The relief afforded the plaintiff need not be "judicially decreed" to justify a fee award under section 1988 – voluntary action, such as a change in conduct that addresses the grievance, is sufficient.

*Stivers v. Pierce*, 71 F.3d 732, 751 (9th Cir. 1995) (internal quotations, brackets and citations omitted).

Defendants contend that the requested fees include time expended representing non-prevailing parties and must be reduced accordingly. "[C]ourts may not adopt rigid mathematical formulas tying the lodestar figure to the ratio of defendants remaining at trial to defendants served in the complaint." *Cunningham*, 879 F.2d at 485.

Likewise, in actions with multiple plaintiffs, the reasonableness of an award of attorneys' fees should turn, not on a rigid subtraction of all matters relating to non-prevailing plaintiffs, but on an assessment of the reasonableness of time spent in furtherance of the prevailing plaintiffs' cases. In order to make such an assessment, the Court must determine which of the plaintiffs prevailed.

The parties agree that Herr and Wilson prevailed, and that Garrison did not. Plaintiffs reduced their request by subtracting 37.2 hours relating to representation of Garrison in the related administrative proceedings and omitting $5,693.17 in costs. Defendants contend that these reductions are not sufficient. However, the only specific challenge is to the cost of Garrison's deposition. Given the nexus among the plaintiffs' cases, fees related to Garrison's deposition would have been necessarily incurred even if Garrison had not been a plaintiff. Accordingly, the Court finds that plaintiffs' reductions with respect to Garrison are sufficient.

Plaintiffs raise two arguments to support their position that Gilbrook, Raphael and Bowler prevailed on their constitutional claims. First, they assert that Gilbrook and Raphael prevailed under *Mt. Healthy* because the jury found for them on the first prong of the *Mt. Healthy* test, concluding that plaintiffs' constitutionally protected conduct was a substantial or motivating factor in the decision to discipline them, despite the fact that the jury ultimately found, applying the second part of the *Mt. Healthy* test, that defendants would have reached the same decision to discipline plaintiffs even if they had not engaged in the protected conduct. In support of their approach, plaintiffs refer the court to the theory articulated by

Sheldon Nahmod in *Civil Rights and Civil Liberties: The Law of § 1983* Vol. 1, § 4.03 (3d ed. 1991). Mr. Nahmod argues that the second part of the *Mt. Healthy* test goes to remedy rather than liability, so that a § 1983 defendant who successfully defends on the grounds that it would have dismissed or disciplined the plaintiff in the absence of the protected conduct has not prevailed on the merits, and, accordingly, plaintiff may be entitled to attorneys' fees.[12]

While Mr. Nahmod's theory may have some merit, the underlying rationale behind the second part of the *Mt. Healthy* test is to avoid making an employee who has participated in constitutionally protected conduct better off than he or she would be in the absence of such conduct. *See Davis v. Ampthill Rayon Workers, Inc.*, 446 F. Supp. 681, 687 (E.D. Va. 1978), *aff'd*, 594 F.2d 856 (1979); *Gooden v. Neal*, 17 F.3d 925, 927 (7th Cir. 1994) (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

In *Gooden*, the Seventh Circuit concluded that the district court decision "that when protected speech is a 'motivating factor' what would have happened in the absence of that speech is not 'germane to the question of liability' [was] untenable." *Id.* at 928. The circuit concluded that the district court had likely confused the *Mt.*

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[12] Plaintiff also cites *Patrick v. Bd. of Trus. of Mineola Ind. Sch. Dist.*, 603 F. Supp. 754 (E.D. Tex. 1984), in which the court awarded half of plaintiff's attorney's fees because plaintiff had succeeded on the first half of the *Mt. Healthy* test. The Court finds *Patrick* unpersuasive. Either plaintiffs prevailed under *Mt. Healthy* or they did not; they cannot have prevailed half-way.

*Healthy* test with the test under Title VII. *Id.* The Court finds the Seventh Circuit's analysis persuasive and concludes that plaintiffs Gilbrook and Raphael did not prevail on their constitutional claims within the meaning of § 1988.

Second, plaintiffs assert that Raphael and Bowler prevailed because the jury found a conspiracy to deprive them of their constitutional rights. To prove civil conspiracy, the plaintiffs were required to demonstrate (1) an agreement to deprive plaintiffs of their constitutional rights; and (2) an actual deprivation resulting from the agreement. *See Ting v. U.S.*, 927 F.2d 1504, 1512 (9th Cir. 1991). However, the Court's ruling on defendants' 50(b) motion implicitly concluded that neither Raphael nor Bowler had proved an actual deprivation of his constitutional rights. Consequently, plaintiffs Raphael and Bowler did not prevail on their conspiracy claims.[13]

Plaintiffs assert that Gilbrook is entitled to fees as a result of the jury decision on his slander claim, but defendants are correct that Gilbrook is not a prevailing party for purposes of § 1988 because he prevailed only with respect to his state-law slander claim and not with respect to his constitutional claims. To qualify as a prevailing party under § 1988, a plaintiff must prevail, in some fashion, on federal claims; a plaintiff who "recovers only

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[13] The Court granted Bowler a new trial on his First Amendment claim, but he has not prevailed. The Court's application of Fed. R. Civ. P. 59 merely entitles him to go to trial on that claim again; it does not constitute a finding in his favor sufficient to denominate him a prevailing party for purposes of section 1988.

on a pendent state claim is not a prevailing party under section 1988 and may not be awarded fees." *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1991) (finding fee award improper where decision on § 1983 claim was adverse to plaintiff). Where the court simply does not reach the federal claims, and "the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact [sic] with a substantial federal claim, fees may be awarded under § 1988." *Id.* (quoting "*Carreras v. City of Anaheim*, 768 F.3d 1039, 1050 (9th Cir. 1985)). Because Gilbrook only prevailed on his state-law slander claim, the hours spent on Gilbrook's claims that would not otherwise have been spent preparing Herr and Wilson's cases must be deducted.

Despite the fact that Gilbrook, Raphael and Bowler were not prevailing parties, the plaintiffs' claims for attorneys' fees need not be substantially reduced. Because the plaintiffs' claims were so interrelated, and because of the cohesive manner in which the parties approached the case, the only time appropriately deducted to ensure a reasonable award is time spent preparing these three plaintiffs with respect to their damages, defending depositions regarding their damages, and presenting the damages portion of their respective cases at trial.

Defendants also assert that time relating to claims of the 20 firefighters who were dismissed from the action early on in the litigation is unreasonably asserted. As with the six trial plaintiffs, the bulk of the work required in preparing the claims of those original plaintiffs was integrally related to the claims of the prevailing plaintiffs.

Thus, only time relating to damages is exclusively related to their claims, and only that time will be excluded.

Upon consideration of defendants' arguments, the court provided defendants with an opportunity to challenge the claimed fees on the limited basis that they relate to preparation or presentation of damages for non-prevailing parties. However, defendants failed to provide the Court with documentation that would allow the court to deduct hours spent by plaintiffs' counsel in assessing and presenting evidence of damages incurred by each non-prevailing plaintiff. Plaintiffs assert that only a very limited amount of time was expended explicitly on preparation of non-prevailing plaintiffs. Plaintiffs do not include time spent presenting testimony and evidence relating to plaintiffs' damages at trial in their summary of time voluntary [sic] deducted as uncompensable. Accordingly, the Court reviews plaintiffs' claimed hours independently.

Plaintiffs' counsel has not provided sufficient detail in the cumulative fee report to allow the Court to excise those hours spent preparing and presenting testimony concerning damages incurred by non-prevailing parties. Consequently, the Court deducts all hours claimed that relate to preparation or presentation of damages, but allows plaintiffs a reasonable amount of time to prepare and present the prevailing parties' alleged damages. Given the amount of court-time devoted to the damages phase of the trial, the Court finds it reasonable for plaintiffs to have expended 24 hours in preparation and presentation of damages for the prevailing parties. Accordingly, the following hours are properly deducted:

| | |
|---|---|
| Davis | 23.5 |
| Courtney | 23.5 |
| Erdman | 2.5 |
| Boltwood | 4.3.[14] |

### 9. Inadequately Described Activities

Where the number of hours claimed is based on inadequate documentation, those hours should be

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[14] Davis and Courtney included preparation and presentation of damages in billing entries totalling 35.5 and 47.5 hours respectively. Erdman and Boltwood billed 2.5 and 4.3 hours, respectively, in entries involving damages claims. However, the billing records for the hours expended on the damages phase do not clearly denote to which plaintiffs they refer. The Court deems 12 hours for each supervising attorney (Davis and Courtney) a reasonable amount of time spent preparing and presenting evidence and testimony on the damages of the prevailing parties. As a result of the Court's reduction in the number of compensable hours, plaintiffs may not be compensated for time that was spent on work unrelated to damages but billed in the same billing entry with damages preparation or presentation. However, it is plaintiffs responsibility to adequately document their efforts. The Court deducts from the following entries in plaintiffs' Exhibit B1:

| | | |
|---|---|---|
| 6/15/95 | LAE | 1.9 |
| 6/15/95 | LAE | 0.6 |
| 6/15/95 | RLB | 4.3 |
| 6/15/95 | SBC | 10.0 |
| 7/03/95 | SBC | 0.3 |
| 7/11/95 | SBC | 1.0 |
| 7/13/95 | SBC | 0.1 |
| 7/24/95 | SBC | 0.3 |

reduced. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484-85 (9th Cir. 1989). "The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *Gates*, 987 F.2d at 1397.

In reply to defendants' objection that certain time was insufficiently documented, plaintiffs eliminated certain entries.[15] Plaintiffs then attempted to submit additional documentation for the hours they still assert were reasonably expended.

Defendants object on evidentiary grounds to the declarations of Vincent Courtney III and Cindy O'Hara, which provide supplemental descriptions, asserting that (1) Ms. O'Hara lacks personal knowledge regarding the time spent by other attorneys and the subject matter of

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8/29/95 SBC 0.3
9/20/95 ACD 2.5
9/20/95 SBC 11.0
9/12/95 ACD 9.0
9/21/95 SBC 10.0
9/22/95 ACD 8.0
9/22/95 SBC 10.5
9/23/95 SBC 4.0
9/23/95 ACD 4.0
9/25/95 ACD 12.0.

[15] Plaintiffs voluntarily eliminated the following hours:

| | |
|---|---|
| Davis | 6.2 |
| Courtney | 0.5 |
| Courtney III | 1.0 |
| Beebe | 9.5. |

each entry; (2) the summary includes inadmissible hearsay; and (3) the evidence lacks foundation to satisfy Fed. R. Evid. 1006 because plaintiffs submitted a summary without making the underlying material available to the opposing party. Where plaintiffs have not adequately described the time billed, the district court may properly allow counsel to "supplement their time sheets with additional documentation of their efforts." *Davis*, 976 F.2d at 1542.

Here, however, the Court found the plaintiffs' unsolicited supplemental documentation inadmissible for each of the reasons asserted by defendants.[16] However, the court allowed plaintiffs an opportunity to submit admissible documentation. Having considered defendants objections to plaintiffs' court-ordered supplemental documentation, the Court concludes that the following hours were insufficiently documented, or not compensable given the subject matter of the work, and that plaintiffs may not recover attorneys' fees for those hours:[17]

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[16] O'Hara's own declaration stated that she reconstructed the more detailed billing entries in part "by speaking with the attorneys designated" and in part by "reviewing the files and original time records." Moreover, there was no evidence that plaintiffs provided defendants with all the underlying documentation to support their summary, as required by Fed. R. Evid. 1006.

[17] The Court deducts these hours for the following reasons:

*related to arbitration*

| | | |
|---|---|---|
| 4/6/94 | COV | 0.1 |
| 4/13/94 | COV | 2.3 |
| 4/14/94 | COV | 1.3 |
| 4/15/94 | COV | 0.2 |

| | |
|---|---|
| Davis | 10.1 |
| Courtney | 0.5 |
| O'Hara | 5.0 |
| Heesch | 6.6 |
| Hinkley | 0.3 |
| Beebe | 17.5 |
| Courtney III | 8.5. |

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| | | |
|---|---|---|
| 5/4/94 | COV | 0.5 |
| 5/4/94 | COV | 0.6 |
| 4/4/94 | ACD | 0.5 |
| 4/19/94 | ACD | 0.4 |
| 4/20/94 | ACD | 0.5 |

*O'Hara lacks personal knowledge*

| | | |
|---|---|---|
| 4/14/94 | RSH | 6.6 |
| 5/4/95 | MLH | 0.3 |

*FBI communication*

| | | |
|---|---|---|
| 6/8/94 | ACD | 2.0 |

*insufficiently described*

| | | |
|---|---|---|
| 8/6/94 | ACD | 0.5 |
| 4/6/95 | VJR | 1.0 |
| 4/24/95 | VJR | 0.5 |
| 4/26/95 | VJR | 0.8 |
| 5/4/95 | VJR | 0.5 |
| 6/20/95 | VJR | 1.2 |
| 7/6/95 | VJR | 0.8 |
| 7/31/95 | VJR | 1.0 |
| 10/12/95 | VJR | 0.4 |
| 10/18/95 | VJR | 0.3 |
| 1/16/96 | VJR | 1.0 |

**10. Travel Time**

Defendants challenge the reasonableness of travel time billed by plaintiffs' counsel. Where attorneys customarily bill their clients for travel time, it is appropriate to compensate them for reasonable travel time in a fee award under § 1988. *Davis*, 976 F.2d at 1543. Plaintiffs have not claimed time for travel to and from court, but have included claims for travel from San Francisco to Los Angeles. In those instances where plaintiffs' counsel billed no more than one hour each way for travel time to Los Angeles, the difference between the travel expense incurred by out-of-town counsel as opposed to in-town counsel is negligible and the court will not reject that travel time as unreasonable, despite the absence of evidence that it was necessary to retain counsel from out-of-town.[18] *See Gates*, 987 F.2d at 1405 (requiring evidence that it was necessary to retain counsel from another judicial district before approving higher rates of out-of-district counsel).

However, where plaintiffs' counsel billed for travel time in excess of one hour each way, that time was not reasonably expended, and the time charged is reduced to one hour each way.[19] Accordingly, plaintiffs'

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[18] In addition, because plaintiffs have an ongoing relationship with their San Francisco counsel, it was reasonable for them to retain them as counsel in this action.

[19] For example, Davis' assertion that he had to drive in order to transport boxes indicates that it was not necessary for those hours to be expended by an attorney.

counsel may not recover the following hours claimed for travel time:[20]

| | |
|---|---|
| Davis | 140.1 |
| Courney [sic] | 69.3 |
| Boltwood | 20.7.[21] |

**11. Fees on Fees**

Plaintiffs request for attorneys' fees and costs incurred in pursuing the award of attorneys' fees and continuing representation of their clients in this action (including plaintiffs' response to defendants' motion for reconsideration and motion to correct order) is supported by a supplemental billing report covering the period March 1, 1996, to October 4, 1996, attached as Exhibit D to the Declaration of Cindy O'Hara in Support of Motion for Award of Attorneys' Fees and Costs, submitted with plaintiffs' reply brief. Defendants did not object to any of plaintiffs' claimed hours, and the Court, upon review of those hours, finds that they were reasonably expended. Accordingly, plaintiffs are entitled to collect fees for the following additional hours billed:

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[20] The Court takes into account those instances in which hours have already been deducted because the travel related to arbitration proceedings in order to avoid double subtracting hours expended by plaintiffs' counsel.

[21] *See* Plaintiffs' Objections to Defendants' Supplemental Summaries as Per Order of December 3, 1996, Re Plaintiffs' Fee Motion, Exhibit C; and Defendants' Supplemental Summaries as Per Order of December 3, 1996, Re Plaintiffs' Fee Motion, Exhibit C.

| | |
|---|---|
| Davis | 22.4 |
| Courtney | 30.0 |
| Erdman | 69.2 |
| O'Hara | 132.7 |
| Courtney III | 42.0 |
| Beebe | 69.0. |

**12. Efficiency of Case Management**

In determining the number of reasonable hours expended, it is appropriate to consider whether hours claimed represent redundant, excessive or otherwise unnecessary work or overstaffing of a case. *Cunningham*, 879 F.2d at 485. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important [in determining a fee award under § 1988]." *Gates*, 987 F.2d at 1397. "[W]hen faced with a massive fee application[,] the district court has the authority to make across-the-board percentage cuts" in the hours claimed, but such a decision must still include a "concise but clear" explanation of the reasons for selecting a particular percentage reduction. *Gates*, 987 F.2d at 1400. Moreover, use of the "meat-axe approach," as the Ninth Circuit has referred to it, is subject to heightened scrutiny. *Id.*

Defendants contend that even after the reduction in hours they seek, the final number of hours expended is excessive. Defendants argue that because of their lack of experience in litigating civil rights cases and because of the inefficiency of the individual attorneys, plaintiffs' counsel spent many more hours than defendants' counsel

in litigating this case. Consequently, defendants seek to reduce Davis and Courtney's hours by 222.6 hours each. However, defendants offer no authority for such a deduction and no reasoning for the figure other than their comparison with the number of hours expended by defendants. As plaintiffs' point out, they bore the burden of proof at trial and, therefore, plaintiffs' counsel was reasonably required to expend significantly more time than defendants in preparing to try the case.

Plaintiffs provide ample evidence that they have exercised billing judgment and reduced the number of hours requested.[22] Moreover, the Court has already assessed the reasonableness of plaintiffs claimed hours as discussed above. An additional across-the-board cut would serve no useful purpose as it would obfuscate, instead of clarifying, the Court's reasoning.[23]

**13. Results Obtained**

A district court should "consider the extent of the plaintiff's success in making its initial determination of hours reasonably expended at a reasonable rate, and not in subsequent adjustment to the lodestar figure." *Gates*, 987 F.2d at 1404. Central to this inquiry are (1) whether plaintiffs have excluded fees associated with unrelated

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[22] Plaintiffs' counsel not only declares that they exercised billing judgment, they also reduced the number of hours claimed in response to defendants' challenges.

[23] Nonetheless, plaintiffs' counsel's allocation of work among partners and associates was less than efficient. This factor is taken into account in setting the proper billing rate for each attorney, as discussed below.

claims on which they did not prevail; and (2) whether plaintiffs' success on interrelated successful and unsuccessful claims was limited. *Id.* "The mere fact that plaintiff[s were] not victorious as to all defendants does not automatically bar an attorney's fee award. However, the amount of attorney's fees they receive should be based on the work performed on the issues [on] which they were successful." *Cunningham,* 879 F.2d at 486 (quoting *Sethy v. Alameda County Water Dist.,* 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied,* 444 U.S. 1046 (1980)) (internal brackets and ellipses omitted). "That the plaintiff is a 'prevailing party' . . . may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Gates,* 987 F.2d at 1403 (quoting *Hensley,* 461 U.S. at 433). With respect to prevailing parties, "a defendant's legal liability is only relevant insofar as it bears on plaintiff's degree of success." *Cunningham,* 879 F.2d at 489.

Taking into account the preceding reductions made by plaintiffs' counsel and by the Court, the number of hours expended by counsel properly excludes fees associated with unrelated claims on which plaintiffs did not prevail. Given plaintiffs' level of success in the matter before the Court, plaintiffs are entitled to an award of attorneys' fees for the following hours expended by plaintiffs' counsel and paralegals:

| | |
|---|---|
| Davis | 1418.5 |
| Reno | 0.5 |
| Courtney | 760.7 |
| O'Hara | 626.7 |

| | |
|---|---|
| Hinkley | 27.2 |
| Wilson | 0.2 |
| Boltwood | 813.2 |
| Schlichtmann | 64.5 |
| Kalemis | 22.4 |
| Heesh | 0.0 |
| Erdman | 785.0 |
| Beebe | 680.3 |
| Courtney III | 122.1 |

**B. Reasonableness of Rates Requested**

"It is well-settled that fees are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Guam Society of Obstetricians and Gynecologists v. Ada,* 100 F.3d 691, 696 (9th Cir. 1996) (quotations and citations omitted). Plaintiffs' attorneys and paralegals request hourly rates ranging from $55-$300. Plaintiffs' counsel contends that these rates are commensurate with the prevailing rates in Los Angeles for attorneys of comparable experience, skill and reputation. In support of this contention, plaintiffs note that in *Morech v. City of Los Angeles,* CV 91-0401 JGD (Tx) (C.D. Cal. Nov. 22, 1994), a case involving the Fair Labor Standards Act ("FLSA"), Judge Davies stated that the prevailing market rate in similar FLSA cases was between $175 to $450 per hour for partners, and $95 to $235 for associates and awarded $277.50 to Mr. Reno. Plaintiff has also

submitted 3 declarations from public-interest-oriented employment civil rights attorneys who charge hourly rates ranging from $250-$375.[24]

Defendants challenge plaintiffs' request, arguing that the market rate in Los Angeles for attorneys of substantial trial experience in the area of employment related

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[24] In these declarations, the attorneys set forth their experience as follows:

*Dan Stormer* ($375/hour) – Stormer has been practicing law for over 20 years, and specializes in public interest labor litigation. He has taught at four law schools and lectured for over 100 CEB and trial programs. Stormer has participated in over 35 civil rights actions, and obtained several multi-million dollar verdicts. Stormer is currently listed as one of the top California labor lawyers.

*Richard M. Pearl* ($320/hour) – Pearl has 27 years experience, and has devoted his entire career to public interest law. Pearl has served as an adjunct professor at University of California at Hastings, as well as Director of Litigation for California Rural Legal Assistance ("CRLA") and Directing Attorney for Cooperative Legal Services at CRLA. An expert on attorney's fees, pearl has written and lectured extensively on the subject. He currently devotes approximately 80% of his work to attorney's fees litigation, and he declares that attorneys with experience comparable to his have been awarded up to $450 per hour.

*Michael Posner* ($250/hour) – Posner has been an attorney for 26 years; his expertise is labor/employment law in the public and private sectors. In addition to participating in many § 1981 and Title VII cases, Posner is a member of several labor law committees, was formerly an associate professor at Glendale College of Law, and has spoken at American Arbitration Association programs.

civil rights is between $100/hour and $200/hour. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on Attorney's Fees and Costs, p. 17 [hereinafter Opposition]. Defendants have submitted declarations from attorneys Linda C. Miller and Russell Hiles, who testify that the prevailing market rate for experienced Los Angeles employment attorneys is between $150 and $200 per hour.

Defendants point out that Pearl and Posner are San Francisco attorneys, and argue that their rates are irrelevant in determining the prevailing Los Angeles rate. It is true that the court should look to the rates of attorneys practicing in the Central District of California. *See Gates*, 987 F.2d at 1405 ("[T]he general rule is that the rates of attorneys practicing in the forum district [] are used"). However, declarant Stormer, who charges $375/hour, practices in Los Angeles. Furthermore, in *Morsch*, the court awarded plaintiff's counsel Reno attorney's fees at a rate of $277.50 per hours.[25] In light of these facts, and the range set out in *Morsch*, the requested hourly fees are within the range of the prevailing rates for employment civil rights attorneys in Los Angeles.

Defendants' counsel has filed declarations indicating that they charged defendants between $130 and $175 per hour for defense of this action. Ferguson Decl. at ¶ 3; Turner Decl. at ¶ 5. Presumably, defendants have provided these rates as evidence of the prevailing rate in the community. However, while these rates might reflect the

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[25] While *Morsch* did not arise under § 1981, it did deal with labor issues. Therefore, it is appropriate to analogize this case to the one presently before the Court.

rate of private government defense attorneys, they do not apply to plaintiffs' counsel. The Ninth Circuit has held that the fee charged to a private attorney representing the government is irrelevant to the reasonable hourly rate for a plaintiff's civil rights lawyer. *Trevino v. Gates*, 99 F.3d at 925. The *Trevino* court explained that an attorney representing the government may charge a lower rate because of "counterbalancing benefits such as repeat business." *Id.* (quoting *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 869 (11th Cir. 1993). While a lower rate may be reasonable for a private government attorney, it is not necessarily appropriate for a plaintiff's attorney who has no assurance of repeat business. Because of this distinction, the private attorney representing the government is in a different legal market than a plaintiff's attorney. Therefore, defense counsel's declarations as to rates are properly disregarded in establishing a reasonable rate for plaintiffs' attorneys.

Defendants also argue that the rates awarded should be no more than the rates that plaintiffs' counsel's firm would actually charge to plaintiffs. As Davis explains in his declaration, his firm has a reduced fee schedule for

"regular clients."[26] Davis Decl. at ¶ 7. Davis explains the difference between this fee schedule and requested fees as follows: "Although we often refer to this fee schedule as our 'basic' or 'regular' fee schedule, it is actually a discounted fee schedule that we provide to our regular clients in reflection of the continuing nature of our relationship with them." *Id.* Davis states that his firm has been representing plaintiff Westminster Fire Fighters, Local 2425 ("Local 2425") for 16 years on a wide variety of labor matters. Because Local 2425 is a regular client,

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[26] The firm's discounted rates and requested rates are as follows:

| Attorney | "Discounted" Rate (as of Jan. 1, 1993) | Requested Rate |
|---|---|---|
| Alan C. Davis | $185 | $300 |
| Duane W. Reno | $185 | $300 |
| Sylvia B. Courtney | $175 | $270 |
| Cindy O'Hara | $165 | $240 |
| Michael Hinckley | $110 | $155 |
| Bruce Wilson | $145 | $155 |
| Russell Boltwood | $110 | $145 |
| Laura Schlictman | $110 | $145 |
| Andrean Kalemis | $110 | $145 |
| Rebecca Heesch | $120 | $145 |
| Laurie Erdman | $110 | $135 |
| Kathy Beebe (paralegal) | $ 45 | $ 95 |
| Vincent Courtney III (paralegal) | $ 36 | $ 55 |

the firm charged plaintiffs according to the discounted fee schedule.

In *Guam Society of Obstetricians and Gynecologists,* the Ninth Circuit confirmed that a district court may refuse to consider prevailing plaintiffs' counsel's "customary and ordinary" fees in determining the appropriate rate of compensation. 100 F.3d at 697 ("[I]t is perfectly appropriate for a district court to award an hourly rate higher than is customarily charged by the plaintiff's attorney. . . . "). Nonetheless, in determining reasonable rates for plaintiffs' attorneys, the Court may consider the fact that counsel regularly charges its "discounted" rates to plaintiff Local 2425 and to other similar defendants because these rates provide evidence of the prevailing market rate in the legal community. Although the *Trevino* court held that one cannot look to an attorney's discounted rate in establishing the rate for *opposing counsel,* this does not mean that the court cannot look to an attorney's discounted rate to determine *his or her own* rate, particularly where, as here, that rate is established based on "counterbalancing benefits" of repeat business. *See Trevino,* 99 F.3d at 925. Furthermore, the firm's discounted fee schedule is within the range of reasonable rates set out in *Morsch.* CV 91-0401 JGD ($175 to $450 for partners; $95 to $235 for associates). Therefore, the Court could reasonably award fees at counsel's "discounted" rates.

Notwithstanding these considerations, in light of the *Johnson-Kerr* factors, the Court finds it appropriate to award fees at a higher rates. In examining the prevailing rates in the community, counsel's discounted fee schedule

is at the bottom of the *Morsch* scale. This case was complex, and, given that complexity, a reasonable attorney would not have taken it on for less than $200 per hour. Furthermore, attorney Reno has been awarded a rate of $277.50, indicating that he deserves a rate higher than $185.[27]

Reno and Davis seek $300 per hour. Reno has 21 years experience, specializes in labor/employment law, and has many published appellate decisions. Davis has similar credentials, and has been practicing for nine years longer than Reno. For these reasons, they both deserve more than their discounted rate of $185. Nonetheless, examination of other *Johnson-Kerr* factors does not justify their requested rate of $300. First, although Davis and Reno have a good deal of experience in labor/employment law, they do not have the same degree of skill and reputation as Pearl (a distinguished author, lecturer and professor); Stormer (a civil rights lecturer listed as one of the top California labor lawyers); or Posner (a professor, lecturer and Daily Journal columnist) in handling civil rights litigation. Based on the level of skill plaintiffs' attorneys demonstrated in the proceedings before this Court, and in light of the *Johnson-Kerr* factors discussed

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[27] Reno was awarded this rate for an FLSA case; there is no indication that his rate should significantly differ in a § 1983 case such as this one. On the other hand, the court is not bound to award an attorney a particular rate merely because the attorney has been awarded that rate in other litigation. "An individual attorney need not be awarded the same hourly rate in all Section 1983 cases because not all such cases are equally complex." *Trevino* at * 12.

above, the Court awards plaintiffs attorneys' fees at the following rates:

| Attorney | Rate |
|---|---|
| Alan C. Davis, Duane Reno | $250 |
| Sylvia Courtney | $225 |
| Cindy O'Hara | $200 |
| Michael Hinckley, Bruce Wilson | $155 |
| Russell Boltwood, Laura Schlictman, Andrean Kalemis, Rebecca Heesch | $145 |
| Laurie Erdman | $135 |
| Kathy Beebe | $95 |
| Vincent Courtney III | $55. |

Multiplying these rates by the hours expended by each attorney or paralegal, the Court arrives at a lodestar amount of $963,328.00.

**C. Reduction of Lodestar Amount**

In those limited instances in which a civil rights plaintiff " 'prevailed' but received only nominal damages and achieved only 'technical' success," a court may deviate from the established lodestar method of computing an award of attorneys' fees. *Morales,* 96 F.3d at 363. Even where damages are nominal,

> [w]hether the plaintiff's success is purely technical or de minimis is determined by examining other factors in addition to the amount of money damages awarded. Primary among such other considerations is the significance of the

> legal issues on which plaintiff claims to have prevailed and the public purpose the plaintiff's litigation served.

*Id.* at 363 (quoting *Farrar v. Hobby*, 506 U.S. 103, 117 (1992) (O'Connor, J., concurring)) (internal quotations omitted). "An award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved." *Id.* (holding plaintiff's nonmonetary success based on jury finding that City and officers were responsible for unlawful arrest served public purpose of deterring such actions). Thus, although courts are required to consider the results obtained in arriving at the lodestar amount, "it is inappropriate for a district court to reduce a fee award below the lodestar simply because the damages obtained are small." *Cunningham*, 879 F.2d at 489.

Defendants contend that because plaintiffs only obtained damages of approximately $1 million, the award of attorneys' fees should be no more than $458,293.61. It certainly cannot be said that the damages awarded here were nominal or purely technical, and, according to controlling law, the Court may not reduce the fee award below the lodestar simply because the damages are significantly less than the amount sought. Based on the Court's findings regarding the reasonableness of hours expended and rates claimed, the total lodestar amount is substantially less than the "more than $2.7 million" claimed by plaintiffs in this motion.

The lodestar is presumptively reasonable and is only to be adjusted based on unsubsumed factors in rare and exceptional cases where supported by specific evidence in the record and detailed findings. *Cunningham*, 879 F.2d

at 487. Defendants have put forth no arguments sufficient to convince the Court that this is a rare and exceptional case in which the lodestar should be reduced.

**D. Enhancement/Multiplier**

Likewise, plaintiffs have not demonstrated that this is a rare and exceptional case in which the lodestar amount should be enhanced. At the outset, the Court notes that plaintiffs veiled attempt to argue for enhancement based on the risk of non-payment flies in the face of established Supreme Court and Ninth Circuit authority.

> In *Dague*, the Supreme Court held that enhancement above the lodestar amount for contingency risk is not proper for fee awards under 42 U.S.C. § 6972(e) or 33 U.S.C. § 1365(d). *Davis* extended *Dague* to calculation of the lodestar itself, and *Gates* extended *Dague* to § 1988 fee awards.

*Guam Society of Obstetricians and Gynecologists*, 100 F.3d at 695 (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Davis*, 976 F.2d 1536; and *Gates*, 987 F.2d 1392)). Nonetheless, a fee applicant may recover more than the lodestar amount where the applicant meets the burden of showing that "such an adjustment is necessary to the determination of a reasonable fee." *Id.* at 697 (quoting *Dague*, 505 U.S. at 562). In assessing the propriety of a multiplier, the Ninth Circuit approved the district court's consideration of "the extreme undesirability of the case, the likelihood that no other attorney on island [sic] would have accepted the case, and the rare and exceptional nature of the case, particularly in the small island community of Guam." *Id.* The Circuit concluded that the

district court did not err in awarding a multiplier of 2.0 where it found that the case was "of the type that attorneys are unwilling to take for fear of ostracization [sic] and out of concern for their personal safety." *Id.* Plaintiffs counsel in Guam had, in fact, been threatened with bodily injury, and the district court found that the police had provided counsel with hourly patrols of her home and office as a result of the perceived seriousness of the threats. *Id.* at n. 7. In sum, the action challenging Guam's anti-abortion statute provides an example of a "rare and exceptional" case in which a multiplier is warranted.

By contrast, this action is a classic § 1983 action, albeit complicated by the number of parties and the difficulty of challenging the actions of elected local officials. All § 1983 litigation involves challenges to state action, and there is no cause to believe any of the factors appropriately considered in deciding whether enhancement is proper are any different in this action than in an action against a police officer for use of excessive force. Accordingly, plaintiffs' request for a multiplier of 2.0 is denied, and the Court will neither enhance nor reduce the lodestar amount.

### E. Allowable Costs

Plaintiffs initially requested $93,079.49 in costs.[28] An award of costs to prevailing parties may include only

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[28] Plaintiffs asserted in reply, without explanation or supporting documentation, that they have incurred an additional $3,108.06 in supplemental costs. Because plaintiffs have not adequately described those purported costs, the request for supplemental costs is denied.

those costs that would "ordinarily be treated as reimbursable in a private attorney-client relationship." *Davis*, 976 F.2d at 1557. Defendants argue that the following costs should be excluded from plaintiffs' award: (1) costs that are "inadequately described," (2) travel costs, (3) arbitration costs, (4) copying charges for deposition transcripts of nonprevailing parties, (5) costs related to plaintiffs' attempt to stop Westminster's move to OCFA, (6) attorney Boltwood's admission fee to the Central District, (7) press release copying charges, (8) Santa Ana Superior Court filing costs, and (9) expert witness costs.

Plaintiffs have agreed to withdraw their requests for Boltwood's admission fee ($40), the Santa Ana Superior Court filing fee ($82), and expert witness costs ($17,143.17), for a total deduction of $17,265.17. The Court therefore addresses only the remaining costs in dispute.

**1. "Inadequately Described" Costs**

Defendants challenged many of plaintiffs' asserted costs on the ground that they were insufficiently described. Indeed, plaintiffs' counsel initially provided only cursory descriptions for its alleged costs (e.g. "Federal Express", "Westlaw-Computer database research," and "messenger travel costs"). As plaintiffs recognized, these descriptions did not provide the Court with enough information to determine whether the costs were compensable. In a private attorney-client relationship, most clients will refuse to pay for inadequately described costs.

In response to defendants' challenge, plaintiffs attempted to provide more detailed information concerning their costs and submitted a supplemental declaration of Vincent Courtney III, in which he attempted to provide a fuller description of each of the challenged costs. The Court found Vincent Courtney III's initial declaration inadmissible, but provided plaintiffs an opportunity to submit an admissible declaration. Defendants now object to Courtney III's second declaration, and its attached Exhibit providing detailed descriptions of costs allegedly incurred, on grounds that Courtney III lacks personal knowledge of the costs incurred. Indeed Courtney III states that he reviewed various documents from which he obtained the information; however, he does not properly authenticate or attach the documents on which he relied in preparing the more detailed statement of costs. Consequently, the Court sustains defendants' objection, excludes challenged costs that were insufficiently described in the original request, and reduces the costs claimed by $10,045.65.

**2. Travel Charges**

Defendants argue that all travel charges should be struck because plaintiffs have not proved their need for out-of-town counsel. Travel expenses are generally not recoverable for out-of-town counsel when the party could have sought representation by local counsel. *Gates*, 987 F.2d at 1405 (requiring evidence that it was necessary to retain counsel from another judicial district before approving higher rates of out-of-district counsel); *Jane L. v. Bangerter*, 828 F. Supp. 1544, 1558 (D.Utah 1993). In the

present case, plaintiffs have provided no evidence that out-of-town counsel was necessary. Therefore, plaintiffs are not entitled to travel costs in the amount of $30,690.66.

### 3. Arbitration Costs

Plaintiffs incurred $24,284.89 is pursuing arbitration early in this action. However, as discussed above, there is no evidence that the arbitration proceedings were necessary to further the civil rights litigation. Because these costs were not required to advance plaintiffs' § 1983 claims, they are not recoverable.

### 4. Copying for Depositions of Non-prevailing Parties

The Court finds that these copying charges are reasonable. As discussed above in relation to attorneys' fees, depositions of non-prevailing parties were necessary to advance the claims of prevailing plaintiffs. Therefore, the Court awards plaintiffs these costs.

### 5. OCFA-Related Costs

As discussed above, plaintiffs' efforts to prevent Westminster from disbanding the fire department and contracting out fire services to OCFA were reasonably expended. Therefore related expenses are properly included in the award of costs.

### 6. Press Release Copying Charges

Costs for press releases are allowed if the releases "contribute, directly and substantially, to the attainment of [plaintiff's] litigation goals." *Davis*, 976 F.2d at 1545. Plaintiffs' public relations work in the present case furthered the goals of this litigation. Furthermore, the copying charge of $37.10 is reasonable, and is properly included in the cost award.

### 7. Costs Since Fee Motion

Plaintiffs seek reimbursement for costs incurred as a result of and since the fee motion, in the amount of $3,108.06. Defendants did not object to plaintiffs' request for additional costs incurred. However, upon its own review, the Court finds a billing entry for travel costs improper and deletes that expense for the same reasons set forth above.[29] Accordingly, plaintiffs are entitled to supplemental costs in the amount of $3,045.56.

### 8. Cost Award

Subtracting the $17,265.17 in claimed costs withdrawn by plaintiffs, the $30,690.66 in disallowed travel costs, the $24,284.89 in disallowed costs associated with the arbitration proceedings, and the $10,045.65 in disallowed costs that were insufficiently described, from the

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[29] Plaintiffs are not entitled to collect for travel expenses in the amount of $62.50 ostensibly incurred on March 2, 1996, as airfare in connection with the attorneys' fees motion.

original cost request of $93,079.49, the Court awards plaintiffs $10,793.12 in costs, plus $3,045.56 in supplemental costs, for a total of $13,838.68, exclusive of attorneys' fees.

**F. Immediate Payment and Interest on Fee Award**

Finally, plaintiffs request immediate payment of fees and costs; pre-judgment interest on the fee award; and payment to the order of Davis, Courtney and Reno, rather to the prevailing plaintiffs. First, plaintiffs are not entitled to immediate payment. Defendants are entitled to post a bond, set by the Court, to stay enforcement of the judgment pending appeal of this action, including appeal of the award of attorneys fees. Plaintiffs' wish for immediate payment is no more meritorious than any other plaintiffs' desire to use judgment monies during the course of an appeal. Plaintiffs' argument is therefore of no avail.

Second, plaintiffs' right to collect attorneys' fees accrues at entry of the judgment entitling them to such fees. *See Finkelstein*, 804 F. Supp. at 1239 (interest on attorney fee award accrues at judgment establishing right to award, not at judgment establishing amount of award); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir. 1980). Plaintiffs are not entitled to pre-judgment interest and have raised no colorable arguments to support a finding to the contrary.

Finally, § 1988 authorizes an award of fees and costs to a "prevailing party," not to that party's attorney. *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990). Davis, Courtney and Reno must obtain fees and costs from its client. The

fee award itself is properly awarded and made payable only to the prevailing parties.

## IV. Conclusion

Plaintiffs' Motion is granted in part and denied in part. Prevailing plaintiffs Herr and Wilson shall recover $963,328.00 in attorneys' fees and $13,838.68 in costs from defendants, for a total award of $977,166.68.

The foregoing shall constitute the Court's findings of fact and conclusions of law as required by Fed. R. Civ. P. 54(d)(2)(C). Moreover, the Court finds no just reason to delay entry of a separate judgment as required by Fed. R. Civ. P. 54(d)(2)(C). Accordingly, a separate judgment awarding attorneys' fees and costs shall be entered forthwith.

**IT IS SO ORDERED.**

DATED: January 22, 1997

/s/ Richard A. Paez
Richard A. Paez
United States District Judge

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| PAUL GILBROOK, et al.,<br>Plaintiffs,<br>v.<br>CITY OF WESTMINSTER, et al.,<br>Defendants. | CASE NO. CV 94-2051 RAP (VAP)<br>JUDGMENT AWARDING ATTORNEYS' FEES AND COSTS<br>(Filed Jan. 22, 1997) |

This action came on for hearing before the Court, Honorable Richard A. Paez, District Judge, presiding. The issues having been duly heard, a decision having been rendered, and the Court having set forth its findings of fact and conclusions of law with respect to attorneys' fees and costs as required by Fed. R. Civ. P. 54(d)(2)(C), it is Ordered and Adjudged that prevailing plaintiffs Herr and Wilson shall have judgment against defendants for attorneys' fees in the amount of $963,328.00 and for costs in the amount of $13,838.68, for a total award of $977,166.68. The judgment shall accrue interest as allowed by law.

IT IS SO ORDERED

DATED: January 22, 1997.

/s/ Richard A. Paez
Richard A. Paez
United States District Judge

Supreme Court, U.S.
FILED
NOV 12 1999
CLERK

(2)

No. 99-650

In The

# Supreme Court of the United States

DAVIS, RENO & COURTNEY,

*Cross-Petitioner,*

v.

CITY OF WESTMINSTER, CHARLES V. SMITH, CRAIG SCHWEISINGER, TONY LAM, DON S. ANDERSON, JOHN T. DEMONACO, BRIAN MAYHEW, ROBERT HUNTLEY, CHARMAYNE BOHMAN AND RICHARD JONES, DON HERR, JOE WILSON and MICHAEL GARRISON,

*Cross-Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION

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## STATEMENT OF THE CASE

The instant Cross-Petition stems from a dispute involving the attorney's fees awarded by the district court to the prevailing plaintiffs in a case currently pending before this Court on a Petition for Writ of Certiorari, *City of Westminster v. Herr*, No. 99-465. Don Herr and Joe Wilson, who are the Cross-Respondents herein (referred to hereafter as "Plaintiffs") were prevailing parties in that action. In brief, Cross-Petitioner Davis, Reno & Courtney (referred to hereafter as "DR&C") who were counsel to Plaintiffs in the trial court, contend that the attorney's fees awarded by the district court should be paid directly to DR&C, rather than to the Plaintiffs who were the prevailing parties below. This argument was rejected by both the district court and the Ninth Circuit. Despite the overwhelming and consistent case authority which supports the rulings of these courts, DR&C seeks review by this court of the decision that fees are to be paid directly to the Plaintiffs. There is no reason why this Court should grant the Cross-Petition for Certiorari herein.

The material facts are straightforward. Since 1982, DR&C, a for-profit, private law firm, represented the Westminster Fire Fighters' Association, Local 2425, International Association of Firefighters, AFL-CIO (hereafter the "Union") on a variety of labor matters. The Union paid DR&C on a monthly basis and DR&C charged hourly fees for its work. There was no written fee agreement between the Union and DR&C. In 1992, when the City of Westminster began to threaten lay offs and staff reductions in the Fire Department, DR&C represented the Union in those matters. It continued to do so once the dispute moved into active litigation, in particular the

federal action, *Gilbrook v. City of Westminster*, D.C. No. Cv 94 2051 ("*Gilbrook*") (the related case, No. 99-465, pending in this Court) which was filed by DR&C in 1994 on behalf of individual firefighters and the Union. The action alleged First Amendment and equal protection violations by the City and certain City officials. Despite the change in the nature of their representation, DR&C did not memorialize their fee arrangement with respect to the litigation in a written agreement. DR&C continued to bill the Union every month for its fees, charged on an hourly basis. The Union paid what it could of these bills until its money ran out, in October, 1995.

At the time trial was set to begin, July, 1995, it was evident that the Union would not be able to finance the litigation. After discussions with the plaintiffs in the *Gilbrook* case, DR&C agreed to continue its representation of them through the end of the proceedings in the district court, even though the plaintiffs were no longer able to pay the mounting fees. Plaintiffs were the prevailing party in the trial court and the court awarded them attorney's fees in the amount of $977,166.68,[1] pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (hereafter "section 1988" or "the Act").[2] The district court denied DR&C's request that the fees be paid

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[1] The Ninth Circuit reduced those fees, eliminating fees for time spent by DR&C on "post-verdict media and public relations activities." Appendix to Petition for Certiorari in Case No. 99-465 (hereafter "City's App.") at 79.

[2] Hereinafter, all references in the text to statutory provisions will be to volume 42 U.S.C. unless otherwise noted.

directly to them and not to the Plaintiffs. DR&C substituted out of the case once it went to the Ninth Circuit on appeal. To protect its interest in the attorney fees awarded by the district court, DR&C intervened in the federal appeal. The Ninth Circuit denied DR&C's appeal of the district court's ruling that the fee award be paid directly to Plaintiffs, and DR&C filed the instant Cross-Petition to seek review of that decision.

## REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

### I. THE RULING THAT THE FEE AWARD SHOULD BE PAID DIRECTLY TO PLAINTIFFS IS CONSISTENT WITH VIRTUALLY ALL APPLICABLE AUTHORITIES, INCLUDING TWO DECISIONS OF THIS COURT.

#### A. This Court Has Held Twice That Section 1988 Fees Vest In The Prevailing Party.

Section 1988 provides in pertinent part that a court has the discretion to award "the prevailing party" in certain enumerated civil rights actions "a reasonable attorney's fee." 42 U.S.C. § 1988. This provision has been interpreted by the Supreme Court to entitle the party, not his counsel, to the discretionary fee. *Evans v. Jeff D.*, 475 U.S. 717, 730, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) ("*Jeff D.*"), *Venegas v. Mitchell*, 495 U.S. 82, 87-89, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990) ("*Venegas*").

In *Jeff D.*, this Court pointed out that Congress' choice of words in the Act indicated Congress' intent that the right to attorney fees in certain civil rights actions

rests with the "prevailing party," and not its attorney. *Jeff D., supra,* 475 U.S. at 730-31, 106 S.Ct. at 1538-39. Accordingly in *Jeff D.*, this Court affirmed the discretion of a district court to approve a settlement which was conditioned on the plaintiff's waiver of the right to recover attorney fees from the defendant. This Court noted also that its reading of section 1988 was consistent with that of a majority of the courts of appeals in the country. *Id.*, 475 U.S. at 730, n.19, 106 S.Ct. at 1539, citing *Jonas v. Stack*, 758 F.2d 567, 570, n.7 (CA 11 1985); *Brown v. General Motors Corp.* 722 F.2d 1009, 1011 (CA 2 1983); *Cooper v. Singer*, 719 F.2d 1496, 1506-07 (CA 10 1983); *White v. New Hampshire Dept. of Employment Sec.*, 629 F.2d 697, 703 (CA 1 1980), *rev'd on other grounds*, 455 U.S. 445 (1982).

A few years later in *Venegas*, the Supreme Court considered whether section 1988 abrogated a contingent fee contract between a civil rights plaintiff and his counsel which would require that the plaintiff pay his counsel more than the statutory fee award recovered against the defendant. *Venegas, supra,* 495 U.S. at 84, 110 S.Ct. at 1681. In the opinion, this Court stated that "we have already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff." *Venegas, supra,* 495 U.S. at 89, 110 S.Ct. at 1683, citing *Jeff D., supra.*[3] The Court reiterated that in *Jeff D.*, "we

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[3] Other statutes with attorneys' fees provisions for "prevailing parties" have also been interpreted to require that the award of fees be made directly to the party, not its lawyer. *See, e.g., Panola Land Buying Assn. v. Clark,* 844 F.2d 1506 (CA 11 1988), (Equal Access to Justice Act); *Freeman v. B&B Assoc.*, 790 F.2d 145 (CA D.C. 1986) (Truth in Lending Act); *Richards v. Reed*, 611 F.2d 545 n.2 (CA 5 1980) (Title VII of Civil Rights Act, 42 U.S.C. § 2000e-5(k)).

recognized that as far as § 1988 is concerned, it is the party's right to waive, settle, or negotiate" its right to fees. *Id.*, 495 U.S. at 88, 110 S.Ct. at 1683. Thus, this Court upheld the contingent fee contract negotiated between plaintiff and counsel. *Id.*, 495 U.S. at 90, 110 S.Ct. at 1684.

Following *Venegas* and *Jeff D.*, appellate courts have adhered to the principle that it is the party, not his attorney, who is entitled to the section 1988 attorney fees award. *Collins v. Romer*, 962 F.2d 1508, 1516 (CA 10 1992); *Benitez v. Collazo-Collazo*, 888 F.2d 930 (CA 1 1989); *Willard v. Mitchell*, 803 F.2d 526, 527 (CA 9 1986).

### B. Exceptions To The *Jeff D./Venegas* Rule Are Rarely Made In Section 1988 Cases, And There Is No "Conflict" Among The Circuits.

While there are examples of exceptions to the *Jeff D.* rule, they are rare and are based on the facts of the particular case. For example, in *Richardson v. Penfold*, 900 F.2d 116 (CA 7 1990), a section 1988 case, the court stated, "where, as in this case, the lawyer's *contractual entitlement is uncontested*," the fee award could be made directly to the lawyer. *Id.* at 117 (emphasis added). Even this apparent exception to the general rule derived from the principle that the fee entitlement belongs initially to the party, who was entitled to enter into a contract involving the fees.

In *Image Technical Service, Inc. v. Kodak*, 136 F.3d 1354, 1357-59 (CA 9 1998) ("*Image Tech.*"), an anti-trust case, neither the plaintiff, nor its counsel were awarded fees even though the plaintiff was the prevailing party, and the Clayton Act provides for a mandatory fee award to

the prevailing plaintiff, not his counsel. The court reluctantly reached this resolution of the case because Image Tech., the plaintiff, had been represented by counsel guilty of an ethical violation which prejudiced Kodak, the defendant. *Id.* at 1359. The court limited its deviation from the general rule to the "exceptional" circumstances of the case at hand. *Id.*

With respect to the instant action, there are no exceptional circumstances present which would warrant any deviation from the rule that section 1988 fees are paid directly to the party. The Plaintiffs had no contract whatsoever covering its fee arrangement with DR&C, let alone a contract entitling them to direct payment of any fees awarded. Indeed, Plaintiffs twice rejected DR&C's proposal that Plaintiffs assign any fees awarded to them. See *infra* § II.B. Case law on this issue could hardly be more clear – Plaintiffs are entitled to direct payment of the fees. There is no reason for this Court to review this action because there is little, if any, conflicting authority on this point. Nothing argued in DR&C's Cross-Petition is persuasive to the contrary.

### C. DR&C's Cross-Petition Cites No Authority Which Conflicts With Precedents Holding That Section 1988 Fees Are To Be Paid To The Party, Not The Attorney.

DR&C's Cross-Petition extensively discusses several cases which preceded either the enactment of the Act, or this Court's decision in *Jeff D.* Cross-Petition at 7-12. These cases are wholly inapplicable since they predate the Act or this Court's holdings in *Jeff D.* and *Venegas* that

fees awarded under section 1988 are to be paid directly to the party, and not to the attorney. *Supra*, § I.A. Even so, DR&C has miscited them. One of these cases is *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) ("*Blum*"). Most of the other cases DR&C cited in this section of the Cross-Petition are discussed in *Blum*.

The issues before this Court in *Blum* were whether section 1988 fees awarded to nonprofit legal services organizations should be calculated according to prevailing market rates, and if so, under what circumstances, if any, could the fee award be adjusted upward. *Id.*, 465 U.S. at 889, 104 S.Ct. at 1544. The case did not discuss to whom the fees are paid at all, except to state that the Act "authorizes district courts to award a reasonable attorney's fee to *prevailing civil rights litigants*." *Id.*, 465 U.S. at 893, 104 S.Ct. at 1546 (emphasis added).[4] Nevertheless, DR&C confused statements by this Court to the effect that section 1988 counsel should be paid at the same market rates as are counsel in actions in which the clients pay the fees with the issue of to whom section 1988 fees are paid. *See, e.g.*, Cross-Petition at 12, citing out of context from *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."

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[4] Later, at page 16 of the Cross-Petition, DR&C erroneously cites *Blum* as authority for the following misstatement: "Congress clearly had class actions in mind when it adopted 42 U.S.C. § 1988." Although *Blum* itself was a class action, the pages cited by DR&C, 465 U.S. at 893-95, make no mention whatsoever of class actions; rather, this Court discussed legislative intent regarding whether section 1988 attorney's fees should be based on prevailing market rates or costs of litigation.

In this section of the Cross-Petition, DR&C also discussed *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 885 (CA 5 1970), and *Brandenburger v. Thompson*, 494 F.2d 885 (CA 9 1974), both of which pre-date enactment of the Act, and therefore cannot be germane to a discussion of to whom the Act authorizes payment of attorney fees. The same is true of *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). Additionally, DR&C erroneously claimed the citation of *Davis* in the section 1988 legislative history was to signify Congressional intent that fees should be paid to counsel, not parties. Cross-Petition at 9. However, the plain language of the Act belies that theory; it awards fees to "prevailing parties." 42 U.S.C. § 1988. Thus, it is not surprising that the portion of section 1988's legislative history in which *Davis* was cited did not discuss the question of to whom the fees should be paid, but rather the appropriate standards for awarding fees under 1988. *See Blum, supra*, 465 U.S. at 893-94, 104 S.Ct. at 1547.

Finally, DR&C seriously misreads the decision in *Jeff D.*, arguing in several instances that it stands for specific propositions which it simply does not.[5] Cross-Petition at

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[5] For example, DR&C completely misstates the content of footnote two at 475 U.S. 721. DR&C said that the Court stated in footnote two, "if there were to be a fee award notwithstanding the waiver in the settlement agreement, the fee award would 'inure' to the legal aid society rather than to the class of mentally and emotionally handicapped children." Cross-Petition at 14-15. However, in note two, the Court's observation was that any fees awarded to the prevailing party, a class composed of mentally and emotionally handicapped children, would benefit the legal aid society which brought the case on behalf of the class, although the individual attorney who worked on the case had entered private practice. This observation is a far cry from DR&C's interpretation.

14-15. The most serious misstatement made by DR&C is the following:

> [T]he Court stated on the other hand that under the facts and circumstances of that particular case [*Jeff D.*], a fee award should not be granted to the plaintiffs but rather to the organization whose attorneys represented them. Cross-Petition at 14.

No authority for this statement is cited. Nor could it be, since nowhere in *Jeff D.* does this Court make such a statement, or anything like it. As discussed above, this Court upheld the right of plaintiffs to waive attorney's fees entirely, thereby depriving their attorneys of any statutory fee award. *Jeff D., supra,* 475 U.S. at 731-32. Unable to find a true conflict in the authorities which govern the analysis of the question in the instant action, DR&C has tried to manufacture a conflict by citing inapplicable authorities and misstating leading cases. There is no call for this Court to review the result here. Payment of section 1988 attorney fees to Plaintiffs herein is entirely consistent with the body of law on the question.

## II. DR&C'S RELIANCE ON *JERRY M. LEWIS* IS MISPLACED AND DOES NOT PROVIDE A REASON FOR REVIEW BY THIS COURT.

### A. *Jerry M. Lewis* Arose under the False Claims Act, a Statute with an Entirely Different Purpose than the Fees Act.

In support of its incorrect argument that other court of appeal decisions conflict with that of the Ninth Circuit herein, DR&C relies heavily and mistakenly on *U.S. ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc.,* 89

F.3d 574 (CA 9 1996) ("*Jerry M. Lewis*"), a case arising under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3732. As it did in its briefing below, DR&C conveniently glosses over the myriad of distinctions between *Jerry M. Lewis* and the instant action.

*Jerry M. Lewis* involved a fee dispute which arose after Virani, a "whistle blower," settled his claim, brought under the FCA, that the Jerry M. Lewis company had defrauded the government. The settlement included a statutory fee award which the district court later ruled should be paid directly to Virani. Hall & Phillips ("H&P"), Virani's attorneys in the FCA action, appealed the payment of fees to Virani, claiming that the fees should have been paid directly to H&P. *Jerry M. Lewis, supra*, 89 F.3d at 576. The Ninth Circuit ruled in favor of H&P in their appeal. *Id.* at 580.[6] However, the *Jerry M. Lewis* decision was limited by the language of the opinion to the false claims, or *qui tam*, arena. *Id.* at 578. That *Jerry M. Lewis*'s holding is limited to FCA cases was signaled again by the Ninth Circuit in the recent *Image Tech.* decision. There the court referred to the issues in *Jerry M. Lewis* as "a similar dilemma in the context of . . . the False

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[6] The Ninth Circuit managed to award the fees directly to H&P without directly contravening the rule established by *Jeff D.* and *Venegas* (which the Ninth Circuit followed in the section 1988 case, *Willard, supra*). The court accomplished this by agreeing that the "power" to seek fees rested with the party, but that once fees had been awarded, the "right" to be paid those fees vested in the attorneys. *Id.* at 578-79. This new formulation, however, was limited to cases under the FCA. *Id.* at 578.

Claims Act. . . . " and noted that *Jerry M. Lewis*'s conclusion was "under the FCA. . . . " *Image Tech., supra,* 136 F.3d at 1358-59.

In *Jerry M. Lewis* the court discussed its rationale for departing from the established rule. It pointed out that if fees awarded under the FCA did not go directly to the attorney, "a wrong would be perpetrated upon the government." *Jerry M. Lewis, supra,* 89 F.3d at 578. This is because the FCA sets up a reward and penalty scheme which involves payment by the wrongdoer to both the government and to the "relator" or whistleblower. The court posited that any monies paid to the relator as attorney fees which were not then paid over to his counsel would represent a windfall to the relator, and a commensurate loss from the government's share of the statutory penalty. *Id.* Obviously such a scheme is not at work in the instant case, or other section 1988 cases, and the U.S. government stands to lose no money when fees are paid directly to plaintiffs. There is no indication that *Jerry M. Lewis*'s deviation from the rule that federal statutory attorney fees are awarded to the prevailing party will, or should, have any impact on fee awards under section 1988.

### B. Even If *Jerry M. Lewis* Were Applicable To A Section 1988 Fee Award, The Facts Here Are Distinguishable.

As pointed out above, *Jerry M. Lewis* was brought under the FCA, an entirely different statute than the Fees Act, and for that reason alone its holding should not be applied to the instant case. But moreover, in *Jerry M.*

*Lewis*, unlike here, there was a written retainer agreement in which H&P reserved the right to seek court awarded fees and costs; was assigned any amounts awarded as fees and costs; and retained "ultimate authority" over litigation and settlement decisions. *Jerry M. Lewis, supra*, 89 F.3d at 575-76, also at 580-82 (Concurring opinion suggests that existence of contractual assignment of fees, not fact that this was FCA case, should be determining factor.) In the instant action, DR&C conceded that its fee arrangement with plaintiffs was never put in writing. 2 FeesER 267.

Moreover, in August 1996, Herr and Wilson each rejected a contingency arrangement proposed by DR&C which expressly would have allowed the firm to intervene to seek a fee award on its own behalf. 2 FeesER 287, 291. Then, in January 1997, Herr and Wilson also rejected DR&C's request that they assign their rights to the section 1988 award to DR&C. 2 FeesER 288-89. By unequivocally rejecting DR&C's August 1996 and January 1997 proposed agreements, plaintiffs denied DR&C the very rights held by H&P in *Jerry M. Lewis*. This Court recognized in *Jeff D.* and *Venegas* that the prevailing parties have the right to assign, augment or waive statutory attorney fees by contract. Parties also have the correlative right *not* to make any such agreements with respect to the attorney fees awarded to them under section 1988. DR&C is not foreclosed from negotiating a settlement of its fee or litigating for a recovery in *quantum meruit*.

## III. NONE OF DR&C'S REMAINING ARGUMENTS PRESENT A BASIS FOR THE GRANT OF THE CROSS-PETITION FOR CERTIORARI.

### A. DR&C Present A Question For Review Which Was Never Raised In The Proceedings Below.

The fourth question presented in the Cross-Petition was whether, as a matter of "sound judicial administration," conflicts between clients and attorneys over statutory fee awards should be resolved by the same trial judge who heard the underlying case. *See* Cross-Petition, Questions Presented at *i*. DR&C never raised this issue in any of the proceedings below, nor do they suggest anywhere in the Cross-Petition that they did. Therefore, it is uncontroverted that this is raised here for the first time. "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Even if, for some reason, the Court would be willing to entertain this question, it does not raise a federal constitutional issue. Indeed, DR&C does not contend that it does. Rather, their argument discusses waste and inefficiency of judicial resources, plainly not a basis for exercise of this Court's discretion to hear this case.

### B. DR&C's Final Argument Is Not Raised By The Questions Presented, Nor Was It Ever Raised Below.

Virtually out of nowhere, in the Cross-Petition, DR&C urges that the rule established by *Jeff D.* and *Venegas* that section 1988 fees vest in the litigant and not his counsel "offends ethical rules." Cross-Petition at 21.

This assertion is not encompassed by any of the questions presented in the Cross-Petition, nor was it ever raised anywhere below. That this Court's reading of Congressional intent regarding section 1988's authorization of payment of attorney fees to prevailing parties should be reviewed because it represents unethical fee-splitting is simply preposterous. Even on its face, the issue fails once subjected to the most basic legal analysis; any pronouncement of standards of ethical conduct for lawyers obviously gives way to a statutory or court created legal standard. Therefore, this argument by DR&C, fatally flawed and never before raised in this action, cannot provide a reason for this Court to grant review.

In sum, the Cross-Petition offers no legally sufficient, or coherent, basis for this Court to grant DR&C's request for a writ of certiorari. DR&C has offered no applicable authority to demonstrate that there is any conflict among United States courts of appeal on the federal question of to whom the right to attorney's fee awards vests under section 1988. DR&C's other arguments in favor of granting certiorari have never before been raised in this action, and they would not provide grounds for review even if they had.

## CONCLUSION

For the reasons outlined above, cross-respondents request that this Court deny the Cross-Petition for Writ of Certiorari.

Dated: November, 1999

Respectfully submitted,

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